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No. 03-

IN THE

Supreme Court of the United States

OTIS ELEVATOR COMPANY,

Petitioner,

v.

YASHARAY MACK AND LOCAL ONE, INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the United States Court of Appeals for the Second Circuit err when it held, in disagreement with the Seventh Circuit, that an hourly worker with no authority to take any tangible employment action against another hourly worker and fellow union member, whom he allegedly harassed, was nevertheless a "supervisor" for the purpose of imposing vicarious liability on his employer because he made and oversaw daily work assignments pursuant to a collective bargaining agreement?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner

Petitioner is Otis Elevator Company, a wholly-owned subsidiary of United Technologies Corporation, a publicly traded company.

Respondents

Respondents are Yasharay Mack, an individual, and Local One, International Union of Elevator Constructors, a labor union. Petitioner believes that Local One has no interest in the outcome of this petition.

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The opinion of the United States Court of Appeals for the Second Circuit is reported at 326 F.3d 116 (2d Cir. 2003). A copy of the opinion is included in Appendix A at 1a-24a. The Memorandum and Order of the District Court granting Petitioner's motion for summary judgment was published at 91 Fair Empl. Prac. Cas. (BNA) 996 and 169 L.R.R.M. (BNA) 2620 (S.D.N.Y. Dec. 18, 2001). It is reprinted in Appendix B at 25a-59a.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Second Circuit denied a petition for rehearing on May 14, 2003. (Appendix C at 60a-61a.) Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 703 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, provides, in pertinent part:

> (a) Employer practices. It shall be an unlawful employment practice for an employer –
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . .

Section 701 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(b), reads in pertinent part as follows:

> (b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person . . .."

PRELIMINARY STATEMENT

The companion cases of *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), held that an employer is vicariously liable for sexual harassment by a supervisor that does not involve a tangible employment action unless the employer can establish an affirmative defense. The employer does not face vicarious liability, however, if the harasser is a co-employee of the victim, not a supervisor. Rather, employers are liable for co-employee harassment only if the employers themselves have contributed to that harassment through their own negligence.

Although *Ellerth* and *Faragher* held that the burden of proof and basis for a claim depend on the determination whether a harasser is a supervisor or a co-employee, those opinions did not explain how to make that determination. Following the reasoning in *Ellerth* and *Faragher* and pre-1998 case law, most of the district courts, and all of the courts of appeal to have addressed the issue, have held that a supervisor is someone to whom the employer has delegated the authority to affect the economic terms and conditions of the victim's employment.

In this case, the Second Circuit explicitly rejected that consensus, adopting instead the far more nebulous standard urged by the Equal Employment Opportunity Commission ("EEOC"). In so doing, it held that Otis is vicariously responsible for the alleged actions of one of its hourly employees, a union member who uncontestedly had no authority, direct or indirect, to hire, fire, demote, promote, transfer, or discipline his co-employee and co-union member.

This court should grant certiorari to restore uniformity among the Circuits and to correct the Second Circuit's expansion of an employer's vicarious liability far beyond what Congress intended.

STATEMENT OF THE CASE

Petitioner Otis Elevator Company ("Otis") manufactures, sells, installs, and maintains elevators. In the New York City area, where this case arose, the Otis employees who install and maintain elevators all belong to Local One, International Union of Elevator Constructors, which has a collective bargaining agreement ("CBA") with Otis. Both the plaintiff-respondent, Yasharay Mack ("Mack") and her alleged harasser, James Connolly ("Connolly"), were hourly employees represented by Local One.

The CBA covers two categories of employees, mechanics (journeymen) and helpers (apprentices). Helpers, who are paid less than mechanics, work with and under the direction of a mechanic. Mack was a helper; Connolly was a mechanic.

The CBA requires that when five or more employees are employed on a service job, one of the mechanics is to be designated mechanic in charge and paid 12½% more for each

hour actually worked as mechanic in charge. Under the CBA, the mechanic in charge "shall have the right to assign and schedule work, direct the workforce, assure the quality and efficiency of the assignment, and to enforce the safety practices and procedures on the job to which he is assigned by the Company." (J.A. at 417.)[1] The mechanic in charge does not, however, have any role in the evaluation or discipline of any other employee, nor does the mechanic in charge have a role in the grievance process in the event that disputes arise on the job.[2] Similarly, the mechanic in charge plays no role in the assignment of mechanics or helpers to various shifts and no role in determining how much overtime may be used. Rather, his job is to allot the work required by management among the employee resources made available by management.[3]

---

1. Citations in the form "J.A. at __" refer to the Joint Appendix filed in the Court of Appeals.

2. The CBA specifies that an employee with a complaint "shall first discuss the issue with his/her supervisor and/or business agent. . . ." (J.A. at 418.) Throughout the CBA, the terms "supervisor" and "supervision" refer to management. (*E.g.*, J.A. at 417 ("service ~~Helpers~~ Apprentices shall be assigned daily by supervision or by a ~~Mechanic~~ Journeyman to one or more locations").)

3. Connolly explained his role as follows:

> I would basically say to the mechanic depending on what time in the job it was, what had to be done, because at various times there was different number of mechanics, so everybody would do their own assignment. If there was five elevators shut down, it would be you take that and you take this and you would take that and you would take that.

(Cont'd)

Local One's constitution treats the position of mechanic in charge as one of special responsibility to the union. The union constitution requires that the mechanic in charge:

> report immediately to the union the following:
>
> (1) Any Brother shifted from said job or shifted to said job.
>
> (2) Any Brother injured on said job.
>
> (3) Any Brother who performs his work hazardous to other Brothers on said job.
>
> (4) Any work assigned or performed by another trade that belongs to the jurisdiction of Local No. One.

(J.A. at 363.)

Mack applied through Local One for work as a helper in May or June of 1999. Otis hired her in that capacity in July. Before she began work, she met with Paul Barrett, Director of Human Resources for Otis in New York City.

(Cont'd)
(J.A. at 545.) If someone refused an assignment from Connolly, he would "talk to the shop steward or someone in-house to address the problem." (*Id.* at 546.)

The mechanic in charge coordinates the assignment of overtime work with the shop steward, a union official, in order to assure equitable distribution of overtime. (*Id.* at 547, 568.)

It is undisputed that he told her to contact him if she experienced any difficulties at the work site, and that she knew how to do so. (J.A. at 60 ¶10, 440 ¶10.)

After two brief assignments elsewhere, Mack was assigned to work as a helper in the Maintenance Department at 200 Park Avenue ("200 Park"). That building housed 69 elevators and 18 escalators, and Otis performed both maintenance and modernization work in the building. Although most of the Otis employees at 200 Park worked on the modernization project, there were enough employees assigned to maintenance to trigger the CBA's requirement that there be a mechanic in charge. Connolly had that role.

Otis managers Michael Donohue, Gerald Mazur, and Philip Gallina worked as supervisors at 200 Park during Mack's tenure there. Gallina supervised the maintenance department and had an office on the 44th floor of the building. Mack knew where Gallina's office was.[4]

When Mack began work at 200 Park, she was assigned to the 8:00 a.m. to 4:00 p.m. shift, the same shift Connolly worked. During her three weeks on that shift, she occasionally worked directly with Connolly, and she contends that he immediately began harassing her with unwanted attentions and crude and insulting remarks. After three weeks on the day shift, Mack was reassigned by Otis to the 4:00 p.m. to

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4. Mack admitted Otis's statement of undisputed fact that "Mr. Gallina's office was located at 200 South Park, and he was available to Plaintiff if she had questions." She disputed whether Gallina was at the building "on a daily basis" and she added that when Gallina was there, "he was rarely at the location where work on elevators was being done." (J.A. at 60-61 ¶12, 441 ¶12.)

12:00 a.m. shift.[5] On that shift, she generally did not work with Connolly. Mack received specific direction as to what tasks to perform from the mechanic with whom she was working at any given time.

Although Mack and Connolly worked different shifts after the first three weeks, they overlapped in the building at the end of the first shift and when Connolly worked overtime.[6] Mack claims that Connolly continued his verbal and occasionally physical harassment. In November, she alleges that she complained to Gallina that she "was plagued with a lot of sexist issues with [Connolly]" and that Connolly was "very abusive" and "always making rude and sexist comments to [her]." Mack admits that she made no complaints to any Otis manager other than her alleged conversation with Gallina, and she acknowledges that she did not go into much detail with Gallina.[7] (J.A. at 63-64 ¶19, 442 ¶19.) As she explained, she did not want to get the reputation of being a "rat" by complaining to management about a fellow member of the union.[8]

---

5. Connolly played no role in the assignment of mechanics or helpers to different shifts.

6. Mack testified that when Connolly worked overtime, he was just another mechanic, not the mechanic in charge. (J.A. at 184.) Her understanding is consistent with the terms of the CBA. (J.A. at 417.)

7. Gallina denies that she ever complained to him about Connolly.

8. I work with the mechanics, they are Union guys, they are company haters and I want to really go in this field

(Cont'd)

In May of 2000, M[illegible]k's father made a telephone call to Local One and a telephone call to Otis to complain about Connolly's treatment of his daughter. Mr. Mack's call to Otis was taken by a manager in Otis's mid-town office, who immediately contacted Barrett. Within two days, Barrett and an officer of Local One met with Mack and her father. Otis initiated an investigation and offered to transfer Mack to another work location. Mack, however, never returned to work after that meeting.

Mack sued Otis[9] under Title VII and similar state and local enactments.[10] On Otis's motion for summary judgment,

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(Cont'd)

> and if you go and you rat on another brother or sister, that's it. You will not get your overtime, you will not be respected.

(J.A. at 117.)

> Being a rat is going to the company, that's what being a rat is.
>
> Q. You certainly didn't want to be a rat?
>
> A. No.

(*Id.* at 171.)

9. Mack also sued Local One, claiming a breach of the duty of fair representation. The District Court granted summary judgment in Local One's favor and the Court of Appeals affirmed that judgment.

10. The standard for determining liability under the state and local laws is identical to the standard under Title VII. (App. A at 8a; App. B at 37a.)

the District Court followed the *Ellerth-Faragher* analysis. First, it held that since the law of the Second Circuit does not consider an alleged constructive discharge to be an allegation of a tangible employment action, Mack's claims against Otis did not trigger the automatic vicarious liability that results when a tangible employment action has been taken as part of the alleged harassment.[11]

Next, the District Court considered whether Otis would be subject to vicarious liability for Connolly's alleged actions, subject to its right to establish an affirmative defense. That question turned on whether Connolly qualified as a "supervisor" of Mack. To answer that question, the District Court adopted the reasoning of the United States Court of Appeals for the Seventh Circuit in *Parkins v. Civil Constructors, Inc.*, 163 F.3d 1027 (7th Cir. 1998):

> [I]t is manifest that the essence of supervisory status is the authority to affect the terms and conditions of the victim's employment. This authority primarily consists of the power to hire, fire, demote, promote, transfer, or discipline an employee. Absent an entrustment of at least some of this authority, an employee does not qualify as a supervisor for purposes [of] imputing liability to the employer.

(App. B at 39a) (quoting *Parkins*, 163 F.3d at 1034).) The District Court also relied on the Fourth Circuit's holding that an employee's "occasional authority to direct [the operational conduct of another employee] while on duty" does not constitute supervisory authority. (*See* App. B at 40a

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11. (App. B at 38a n.3.)

(quoting *Mikels v. City of Durham*, 183 F.3d 323, 334 (4th Cir. 1999).) Since Mack had not presented any evidence to support her claim that Connolly had the ability to take or influence a tangible employment action with respect to her status, the District Court held that Connolly was not a supervisor within the *Ellerth-Faragher* framework.

Finally, the District Court concluded that the admittedly vague conversation Mack claimed to have had with Gallina in November did not constitute notice to Otis of Connolly's alleged harassment. Since there was no evidence of any other purported notice to Otis before the calls made by Mack's father in May and since Otis responded promptly and appropriately to those calls, the District Court held that Mack could not establish liability based on negligence by Otis. (App. B at 47a-50a.) Accordingly, the District Court granted Otis's motion for summary judgment.

The Court of Appeals reversed, holding that Connolly is a supervisor as a matter of law and that Mack had presented sufficient evidence, in the form of her alleged conversation with Gallina, to raise a triable response to Otis's affirmative defense. In reaching its conclusion, the court acknowledged that Connolly possessed none of the authority the Seventh Circuit considered essential to a finding that an alleged harasser is a supervisor. (App. A at 15a-16a.) The Second Circuit, however, disagreed with the Seventh Circuit's definition:

> We therefore conclude that the authority that renders a person a supervisor for purposes of Title VII analysis is broader than that reflected in the *Parkins* test.

> To be sure other courts have adopted the *Parkins* definition of supervisor.[12] For the reasons set forth above, however, we agree with those courts that have not defined supervisor so narrowly.[13]

(*Id.* at 17a.)

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12. At this point, the Court of Appeals referred to footnote 5 of its opinion, which reads as follows:

> The district court also cited *Trigg v. New York City Transit Auth.*, No. 99-CV-4730, 2001 WL 868336, at *7, 2001 U.S. Dist. LEXIS 10825, at *22 (E.D.N.Y. July 26, 2001) (adopting the *Parkins* definition of supervisor as one who has "the power to hire, fire, demote, promote, transfer, or discipline an employee"), *aff'd*, No. 01-9104, 2002 WL 1900463, 2002 U.S. App. LEXIS 17355 (2d Cir. Aug. 16, 2002); *Jackson v. T & N Van Serv.*, 86 F. Supp. 2d 497, 501 (E.D. Pa. 2000) (citing with approval the *Parkins* definition of supervisor); and *Mikels v. City of Durham*, 183 F.3d 323, 334 (4th Cir. 1999) (considering, in concluding that the allegedly harassing employee was not the plaintiff's supervisor, that the employee did not have the power to take tangible employment actions against the plaintiff), in support of the test it employed to determine whether Connolly was Mack's supervisor. *Mack*, 2001 WL 1636886, at *7, 2001 U.S. Dist. LEXIS 20917, at *21-*22.

(App. A at 16a n.5.)

13. The opinions cited by the Court of Appeals allowing this statement are *Dinkins v. Charoen Pokphand USA, Inc.*, 133 F. Supp. 2d 1254, 1266 (M.D. Ala. 2001) and *Kent v. Henderson*, 77 F. Supp. 2d 628, 634 (E.D. Pa. 1999). (*See* App. A at 17a.)

REASONS FOR GRANTING THE PETITION

I. The Decision Below Creates A Conflict Among The Circuits On An Important And Recurring Question Of Federal Law

Under *Ellerth* and *Faragher*, the decision whether a harasser is or is not a supervisor carries significant legal consequences. If the harasser is a supervisor, the employer is vicariously liable for his or her actions, although the employer can avoid liability for the supervisor's actions in the absence of a tangible employment action[14] by proving the elements of the affirmative defense recognized in *Ellerth* and *Faragher*. *Ellerth*, 524 U.S. at 764-65; *Faragher*, 524 U.S. at 807-08. If, on the other hand, the harasser is not a supervisor, the employee bears the burden of proving that the employer has been negligent. *Faragher*, 524 U.S. at 799-800; *see, e.g.*, *Quinn v. Green Tree Credit Corp.*, 159 F.3d 759, 766 (2d Cir. 1998). As the holdings below demonstrate, the difference in burdens will often be decisive.

Although *Ellerth* and *Faragher* "have been a source of confusion for lower courts attempting to determine exactly which employees qualify as supervisors," Stephanie Ann Henning Blackman, Note, *The Faragher and Ellerth Problem: Lower Courts' Confusion Regarding the Definition of "Supervisor"*, 54 Vand. L. Rev. 123, 124 (2001), that confusion has not previously extended into the ranks of the Courts of Appeals. *See* Timothy S. Bland & David P. Knox,

14. "A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Burlington Indus., Inc. v. Ellerth*, 524 U.S.742, 761 (1998).

EEOC's Guidance On Vicarious Liability For Supervisory Harassment: Are the Courts Following the EEOC's Lead?, 30 U. Mem. L. Rev. 793, 803 (2000) (noting that *Ellerth* and *Faragher* "contained virtually no information regarding how to determine whether an employee is a supervisor" and that courts have been "reluctant" to adopt the broad definition advocated by the EEOC.) The conflict created by the decision below is clear: if the Second Circuit had applied the standard established by the Seventh Circuit in *Parkins* (and the Fourth Circuit in *Mikels v. City of Durham*, 183 F.3d 323 (4th Cir. 1999)),[15] it would have affirmed the District Court's holding that Connolly was not Mack's supervisor. Instead, the Second Circuit disagreed with *Parkins*, siding with "those courts that have not defined supervisor so narrowly."[16] (App. A at 17a.) The Second Circuit thus became the only court of appeals to reject "the traditional 'hiring, firing, or conditions of employment' definition of supervisor." Blackman, Note, 54 Vand. L. Rev. at 146; *see Indest v. Freeman Decorating, Inc.*, 168 F.3d 795, 804 (5th Cir. 1999) (Wiener, J., concurring) "'Supervisor' continues to mean the same thing that it meant under pre-*Ellerth/Faragher* jurisprudence."); *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 803 (6th Cir. 1994)

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15. *See also Hall v. Bodine Elec. Co.*, 276 F.3d 345, 355 (7th Cir. 2002) ("[T]he fact that an employer authorizes one employee to oversee aspects of another employee's job performance does not establish a Title VII supervisory relationship. An individual is not a supervisor unless he possesses the authority to directly affect the terms and conditions of a victim's employment.").

16. In its invited amicus filing in the Second Circuit, the EEOC urged the court to read *Parkins* as consistent with a finding that Connolly was a supervisor. (Br. of the EEOC as Amicus Curiae at 16-17, *Mack v. Otis Elevator Co.*, 326 F.3d 116 (2d Cir. 2003).) The Second Circuit declined that invitation to judicial sophistry.

(Courts have defined "agent" in Title VII as "an individual who 'serves in a supervisory position and exercises significant control over the plaintiff's hiring, firing, or conditions of employment.'")

The Second Circuit's holding will only increase the confusion in the lower courts concerning the question made central by *Ellerth* and *Faragher*. In the year ending September 30, 2002, employment cases under the civil rights statutes constituted the largest category of new cases identified by the Administrative Office of the U.S. Courts, other than habeas corpus petitions and asbestos claims. Administrative Office of the United States Courts, *2002 Annual Report of the Director: Judicial Business of the United States Courts*, Table C-2A, *available at http://www.uscourts.gov/judbus2002/contents.html*.[17] Allowing the uncertainty and division among the lower courts to continue would, therefore, significantly impede the work of the judicial system while raising the cost of litigation for tens of thousands of employers and employees.

II. The Decision Below Incorrectly Extends An Employer's Vicarious Liability For Sexual Harassment By An Employee

Ellerth and *Faragher* accepted the holding in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), that Congress intended "to place some limits on the acts of

17. In three of the preceding four years, only habeas petitions outnumbered civil rights employment actions, and in the fourth, the year ending September 30, 1998, employment cases outnumbered any other category. Administrative Office of the United States Courts, *2002 Annual Report of the Director: Judicial Business of the United States Courts*, Table C-2A, *available at http://www.uscourts.gov/judbus2002/contents.html*.

employees for which employers under Title VII are to be held responsible." *Id.* at 72. *See Ellerth*, 524 U.S. at 763-64; *Faragher*, 524 U.S. at 792, 800. To recognize that limitation, reflected in Title VII's applicability only to an "employer" and its definition of "employer" as "a person engaged in an industry affecting commerce . . . and any agent of such a person," 42 U.S.C. § 2000e(b), this Court limited an employer's potential vicarious liability for its employees' actions to wrongdoing by a "supervisor". *Faragher*, 524 U.S. at 800-01. As the Court explained in *Ellerth*, a supervisor is a person who has been empowered by the employer to take or bring about tangible employment actions, and that empowerment may significantly increase the supervisor's power to harass:

> A co-worker can break a co-worker's arm as easily as a supervisor, and anyone who has regular contact with an employee can inflict psychological injuries by his or her offensive conduct. But one co-worker (absent some elaborate scheme) cannot dock another's pay, nor can one co-worker demote another. Tangible employment actions fall within the special province of the supervisor. **The supervisor has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control.**

Ellerth, 524 U.S. at 762 (citations omitted, emphasis added).[18]

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18. The harasser in *Ellerth* was a mid-level manager with hiring and firing authority (subject to higher-level approval) over Ellerth. *Ellerth*, 524 U.S. at 747. In *Faragher*, the harassers were officers (a lieutenant and a captain) in a work unit structured as a paramilitary

(Cont'd)

When no tangible employment action has occurred, the supervisor's augmented ability to harass created by the implicit threat of the company-conferred power "to make economic decisions affecting other employees under his or her control" justifies imposing vicarious liability on the supervisor's employer. *Id.* at 763-65.

The *Parkins* definition of a supervisor is consistent with the language and rationale of *Ellerth*; the holding below is not. The Second Circuit found that Connolly was Mack's supervisor, as a matter of law, because "he had and exercised the authority to make and oversee the daily work assignments of the mechanics and mechanics' helpers at 200 Park, including Mack." (App. A at 18a.)[19] That ruling adopts the position of the EEOC's enforcement guidelines, which state as follows:

> An individual qualifies as an employee's "supervisor" if:
>
> a. the individual has authority to undertake or recommend tangible employment decisions affecting the employee; *or*

(Cont'd)

organization, and Faragher was an employee at the lowest level of that structure. "Through this chain of command, the City vested in the Marine Safety supervisors [the harassers] both administrative and disciplinary authority over the lifeguards." *Faragher v. City of Boca Raton*, 864 F. Supp. 1552, 1564 (S. D. Fla. 1994), *aff'd in part, rev'd in part*, 111 F.3d 1530 (11th Cir. 1997) (en banc), *rev'd*, 524 U.S. 807 (1998).

19. While it is undisputed that Connolly, as mechanic in charge, allocated work among the mechanics, he assigned tasks to Mack only when she worked with him as his helper. Otherwise, she did what the mechanic with whom she was working told her to do. (*See* J.A. at 78, 81 (mechanic tells helper what to do).)

b. The individual has authority to direct the employee's daily work activities.

EEOC: Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors, 8 Fair Empl. Prac. Manual (BNA) 405:7651, 7654 (2003). (*See* App. A at 17a-18a.)

This "standard" draws almost no line at all around an employer's vicarious liability for the actions of its employees. Mack was a mechanic's helper, an apprentice. Every journeyman mechanic with whom she worked had "authority to direct [her] daily activities." Indeed, the very definition of an "apprentice" contemplates exactly that relationship between apprentice and journeyman. *See* Webster's Third New Int'l Dictionary 106 (1986) (defining apprentice as "one who is learning by practical experience under skilled workers a trade, art, or calling") Under the Second Circuit's holding, each of Otis's mechanics can be a "supervisor" for the purpose of imposing vicarious liability under Title VII.[20]

Even in the absence of formal apprenticeship programs, the modern workplace is likely to contain a great variety of work arrangements in which one employee directs others in carrying out tasks in which he or she is particularly skilled.[21]

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20. In her deposition testimony and in her briefs to the Second Circuit, Mack identified each of the mechanics with whom she worked as her supervisors.

21. *See, e.g.*, Steven H. Appelbaum, Mary Bethune, and Rhonda Tannenbaum, *Downsizing and the emergence of self-managed teams*, Participation and Empowerment: An International Journal, Vol. 7 No. 5, at 109 (1999) (estimating that by 2000, (Cont'd)

Under the rule adopted by the Second Circuit, employers will be vicariously liable for acts of harassment committed by employees who step into these leadership, but not management, roles.[22] And, of course, the many employers organized along paramilitary lines, such as police and fire departments and private security services, will be vicariously liable for the actions of every employee other than the most raw recruit, since each employee can tell colleagues with lower ranks what to do.[23] *But see Mikels v. City of Durham*,

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(Cont'd)
"90 percent of all North American organizations will have at least some type of self-managed teams"); *id.* at 124 (self-managed teams "typically handle job assignments, plan and schedule work, make production-related decisions and take action on problems" as part of "a downward push of management's power to the employee ranks"); Kimball Fisher, *Leading Self-Directed Work Teams* 3 (1993) (widespread adoption of "various forms of empowerment" including "self-directed work teams"). *See generally* Andrew Polland, Comment: *The Emergence of Self-Directed Work Teams and Their Effect on Title VII Law*, 148 *U. Pa. L. Rev.* 931 (2000).

22. The EEOC guidelines endorsed by the Second Circuit even specify that "[a]n individual who is temporarily authorized to direct another employee's daily work activities qualifies as his or her 'supervisor' during that time period." EEOC: Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors, 8 Fair Empl. Prac. Manual (BNA) 405:7651, 7655 (2003). Thus, by asking one employee to teach another how to perform a task and thereby empowering the teacher to "direct [the student's] daily activities" for the period of the instruction, the EEOC guidelines provide that the employer becomes vicariously liable for any Title VII violation he commits.

23. The Second Circuit's apparent belief that the senior employee "regularly" on a work site *ipso facto* becomes a "supervisor" (*see* App. A at 18a) necessarily implies that a corporal working with a private in a guard shack can impose vicarious liability on their mutual employer.

183 F.3d 323, 333-34 (4th Cir. 1999) (holding that corporal in police department not "supervisor" of patrol officer for purposes of Title VII).

Faragher explained that imposing vicarious liability on employers for harassment committed by supervisors makes sense because the number of supervisors is limited:

> Recognition of employer liability when discriminatory misuse of supervisory authority alters the terms and conditions of a victim's employment is underscored by the fact that the employer has a greater opportunity to guard against misconduct by supervisors than by common workers; employers have greater opportunity and incentive to screen them, train them, and monitor their performance.

Faragher, 524 U.S. at 803. The holding below and the EEOC Guidelines it adopts assign vicarious liability far more promiscuously. Under the Second Circuit's holding, an hourly employee with a special obligation to report contract-related issues to his union has become Otis's agent for the purpose of imposing vicarious liability on it. Under the Second Circuit's reasoning, all of Otis's service and maintenance employees other than apprentices, and a large percentage of all employees of most employers, will be sources of vicarious liability under Title VII, at least some of the time.[24] That result is not what Congress intended or this Court contemplated.

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24. *See supra* n.22.

CONCLUSION

For the reasons stated above, this Court should grant Otis's Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND DECIDED APRIL 11, 2003

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2002

(Argued: November 1, 2002
Final Submission: January 3, 2003 Decided: April 11, 2003)

Docket No. 02-7056

YASHARAY MACK,

Plaintiff-Appellant,

- v. -

OTIS ELEVATOR COMPANY and
LOCAL 1 INTERNATIONAL UNION
OF ELEVATOR CONSTRUCTORS,

Defendants-Appellees.

Before: FEINBERG, CARDAMONE, and SACK, *Circuit Judges.*

SACK, *Circuit Judge*:

The plaintiff, Yasharay Mack, appeals from the judgment of the United States District Court for the Southern District of New York (Loretta A. Preska, *Judge*), which granted the

defendants' motion for summary judgment and dismissed the complaint. We conclude that the district court correctly granted the defendants' motion with respect to Mack's claims under Title VII alleging failure to represent, unlawful constructive discharge, and retaliation, but erred in granting the motion with respect to Mack's hostile work environment claim. Accordingly, we affirm in part and vacate and remand in part.

STANDARD OF REVIEW

We review a district court's grant of summary judgment *de novo*, construing the evidence in the light most favorable to the nonmoving party. *Tenenbaum v. Williams*, 193 F.3d 581, 593 (2d Cir. 1999), *cert. denied*, 529 U.S. 1098 (2000). A district court must grant a motion for summary judgment if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law," Fed. R. Civ. P. 56(c), i.e., "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). A fact is "material" for these purposes if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue of fact is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

The recitation of the factual background of this appeal upon which we are about to embark paints at least one employee of the defendant Otis Elevator Company ("Otis") in decidedly unflattering colors. We therefore emphasize at

the outset that at this stage of the proceedings we are required to construe the evidence in the light most favorable to the plaintiff, and much of the evidence the plaintiff presents is her own testimony. As a result, the account that follows may or may not reflect the facts as they are, or as they may be found at trial. *See Holtz v. Rockefeller & Co.*, 258 F.3d 62, 69 (2d Cir. 2001).

BACKGROUND

The plaintiff Yasharay Mack, an African-American woman, worked as an elevator mechanic's helper for Otis from July 1999 through May 2000. Mack was assigned to work assisting six mechanics at the Metropolitan Life Building, an office building with sixty elevators located at 200 Park Avenue in New York City ("200 Park").

The collective bargaining agreement ("CBA") between Otis and Local 1 International Union of Elevator Constructors ("Local 1" or "the Union") governing the employment of Mack and her co-workers at 200 Park provides that one mechanic is designated "mechanic in charge" whenever there are five or more Otis employees on one job, as there were at 200 Park. CBA at 23. James Connolly was the mechanic in charge at the site. Under the terms of the CBA, the mechanic in charge has "the right to assign and schedule work, direct the work force, assure the quality and efficiency of the assignment, and to enforce the safety practices and procedures." *Id.* According to Connolly's deposition testimony, he assigned work to the other mechanics and helpers, including Mack, as he was supposed to under the CBA. Connolly's supervisor, Phil Gallina, maintained an office at 200 Park but was seldom there.

Appendix A

According to Mack's deposition testimony, on her first day on the job at 200 Park, Connolly said to her, "I was curious to know what you look like and I have to say you are quite an attractive young lady." Mack Dep. at 83. Connolly then introduced her to another mechanic saying, "Tell me she is not the most attractive helper you've ever had. She is sticking with me." *Id.* Connolly continued to comment on Mack's appearance, telling her repeatedly, for example, that she had a "fantastic ass," *id.* at 125-26, "luscious lips," *id.* at 128, and "beautiful eyes," *id.* at 132.

Connolly regularly changed out of his uniform in front of Mack at the end of his shift, stripping down to his underwear and adjusting himself before changing into his street clothes. He also boasted to Mack about his sexual exploits. On one occasion, in front of all the other mechanics, Connolly grabbed Mack by the waist, pulled her onto his lap, tried to kiss her and touched her buttocks. Connolly explicitly questioned Mack's place in the elevator business as a woman and an African American. He told her that "spics" and "niggers" did not "belong in the business," *id.* at 103, and that he did not "know why women are on this job anyway," *id.* at 138. Connolly, in his deposition testimony, disputed most of Mack's allegations, although he admitted to changing into his street clothes in front of her.

Mack further testified at her deposition that in November 1999, she repeatedly complained to Gallina about Connolly's behavior, and asked Gallina to transfer her to a different department so that she would not have to work with Connolly. Mack told Gallina that she was "plagued with a lot of sexist issues with [Connolly]," *id.* at 86, and that Connolly was

"always making rude and sexist comments" to her, *id.* at 205. Mack also stated that she complained to Craig Reiff, a Union shop steward, in April or May of 2000, and similarly requested that Reiff transfer her to a different location.

Mack further testified that she repeatedly complained of Connolly's conduct to the other mechanics on her team, who, she says, often witnessed and sometimes participated in her mistreatment. Indeed, during their depositions, co-worker Richard Morrison admitted telling Mack to "Come on, bitch," Morrison Dep. at 31, and co-worker Gerard Lombardo admitted telling Mack that she was "attractive" and "smelled good," Lombardo Dep. at 80-81. Lombardo further stated that he witnessed Connolly frequently commenting on Mack's appearance. Co-worker Stephen Hook witnessed the lap incident, although he said that Mack was laughing when it occurred.

At the time of these events, Otis had a comprehensive policy in place that prohibited racial discrimination and sexual harassment in both its *quid pro quo* and hostile work environment manifestations. The policy provided several avenues of complaint for employees who thought themselves aggrieved, including an "800" telephone number that an employee could use to report the sort of incidents alleged here. The policy also instructed aggrieved employees to inform their "supervisor, unless he/she is the alleged harasser." Otis Elevator Co. Policy on Harassment in the Workplace. Mack concedes that she was aware of the policy. She testified, however, that she did not take advantage of all the avenues provided because she did not want to be considered "a rat." Mack Dep. at 198. She also testified that

she knew that Connolly "had a reputation to get away with things and I was too new in the field to start trouble." *Id.*

According to Mack, as part of his responsibilities in assigning and overseeing daily tasks, Connolly also assigned overtime work; the defendants counter that this was merely a clerical responsibility. *Compare* Defendants' Rule 56 Statement of Facts ¶ 16, *with* Plaintiff's Rule 56.1 Counter-statement of Facts ¶ 16. Mack testified that "[t]owards the end when things got bad with Connolly he gave me very little [overtime]. That's what he did when he was angry with people." Mack Dep. at 109. On May 16, 2000, according to Mack, Connolly, dressed only in his underwear, threatened Mack: "If you don't like the way I'm talking to you, if you don't like the way I am, you can go complain to Phil Gallina, you can complain to [Local 1 President] John Green. . . . I don't give a shit. I get away with everything. I always have and I always will. . . . You're nobody. . . . If you don't like the way I treat you, you can get the fuck out." *Id.* at 303-04. Mack replied, "I'm not going to quit my job because you're an idiot." *Id.* at 304.

Shortly thereafter, Mack's father contacted a Union representative and complained about his daughter's treatment. A meeting was arranged for Union representative Tony Orriga, Otis representative Paul Barrett, Mack and her father. At the meeting, Mack described Connolly's conduct, and Orriga and Barrett promised an investigation and offered to transfer Mack to their Rockefeller Center location. Mack never returned to work.

Appendix A

On October 13, 2000, Mack brought suit against Otis in the United States District Court for the Southern District of New York under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq.*, New York State Human Rights Law, N.Y. Exec. Law § 290 *et seq.*, and New York City Human Rights Law, N.Y.C. Admin. Code § 8-101 *et seq.*, alleging that Otis had subjected her to a hostile work environment, had constructively discharged her, and had unlawfully retaliated against her. Mack also brought suit against the Union alleging constructive discharge,[1] retaliation and failure to represent. The defendants made a motion in the district court for summary judgment, which was granted in its entirety. *Mack v. Otis Elevator Co.*, No. 00-CIV-7778, 2001 WL 1636886, 2001 U.S. Dist. LEXIS 20917 (S.D.N.Y. Dec.18, 2001) ("*Mack*").

Mack appeals.

DISCUSSION

I. Hostile Work Environment Claim

The district court concluded, *inter alia*, that Mack had not evinced evidence from which a reasonable trier of fact could conclude that Mack was harassed by an Otis "supervisor," and that Otis could not, therefore, be held vicariously liable on that basis for the harassment that created a hostile work environment for Mack. For the reasons set forth below, we disagree.

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1. Mack has abandoned her constructive discharge claim against the Union on appeal.

Appendix A

Title VII[2] is violated "[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (citation and internal quotation marks omitted). To survive a motion for summary judgment, a plaintiff claiming he or she was the victim of an unlawful hostile work environment must elicit evidence from which a reasonable trier of fact could conclude "(1) that the workplace was permeated with discriminatory intimidation that was sufficiently severe or pervasive to alter the conditions of [his or] her work environment, and (2) that a specific basis exists for imputing the conduct that created the hostile environment to the employer." *Richardson v. New York State Dep't of Corr. Serv.*, 180 F.3d 426, 436 (2d Cir. 1999) (citation and internal punctuation omitted). The district court bypassed the first issue, granting summary judgment for Otis on this claim based on its resolution of the second issue: The court concluded that Mack had provided an insufficient basis to hold Otis liable for the allegedly discriminatory conduct.

A. Hostile Work Environment

The district court assumed without deciding that Mack's workplace was "permeated with discriminatory intimidation that was sufficiently severe or pervasive to alter the conditions of her work environment." *Mack*, 2001 WL 1636886, at *6, 2001 U.S. Dist. LEXIS 20917, at *17-*18

2. "Our consideration of claims brought under the state and city human rights laws parallels the analysis used in Title VII claims." *Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 565 n.1 (2d Cir. 2000).

(quoting *Van Zant v. KLM Royal Dutch Airlines*, 80 F.3d 708, 715 (2d Cir. 1996)) (internal quotation marks omitted). We think it clear from the evidence described above construed in the light most favorable to the plaintiff that "the record taken as a whole could . . . lead a rational trier of fact to find," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986), that Mack's "workplace [was] permeated with discriminatory intimidation, ridicule, and insult, . . . sufficiently severe or pervasive to alter the conditions of [her] employment and create an abusive working environment." *Harris*, 510 U.S. at 21 (citation and internal quotation marks omitted). Her claim thus survives the defendants' motion for summary judgment on this issue. The dispositive question with respect to the hostile work environment claim on Otis's motion to dismiss, to which we now turn, is therefore whether "a specific basis exists for imputing the conduct that created the hostile environment to [Otis]." *Van Zant*, 80 F.3d at 715.

B. Imputing Liability to Otis

1. Determining Whether Connolly Was Mack's "Supervisor." The starting point for analyzing employer vicarious liability in a Title VII hostile work environment action is to determine whether the person who allegedly created that environment is properly characterized as having been the plaintiff's "supervisor." According to *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998), which together provide the bedrock upon which the current law of vicarious liability in Title VII hostile work environment cases is built, it is only when a "supervisor with

immediate (or successively higher) authority over the employee" has engaged in the complained of conduct, that the "employer [may be] subject to vicarious liability." *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807 (1998).[3] Employers are not, by contrast, vicariously liable for a hostile work environment created by a mere co-worker of the victim.

Vicarious liability for supervisor harassment draws on, but is not exclusively derived from, principles of agency. *Ellerth* begins its discussion of vicarious liability under Title VII with an examination of those principles as set forth in the Restatement (Second) of Agency (1958) (the "Restatement"). The *Ellerth* Court acknowledged that harassment by one employee of another is not ordinarily an act within the harasser's scope of employment and that the employer is therefore not ordinarily vicariously liable for the creation of a hostile work environment on that basis. *Ellerth*, 524 U.S. at 756-57. But under section 219(2) of the Restatement, an employer may be held liable for the actions of an employee even when they are outside the scope of employment. Such liability may arise, for example, if the employee "was aided in accomplishing the tort by the existence of the agency relation." Restatement, § 219(2)(d). *See Ellerth*, 524 U.S. at 758.

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3. Although prior to *Ellerth* and *Faragher* we discussed at length the vicarious liability of employers for the actions of their supervisors, *Torres v. Pisano*, 116 F.3d 625, 633-35 (2d Cir.), *cert. denied*, 522 U.S. 997 (1997), we have not reconsidered the standard for determining who is a supervisor in light of these relatively recent Supreme Court decisions.

The Court noted, though, that in a sense and to an extent, all workplace harassers are aided in their misbehavior by the agency relationship with their employer, because "[p]roximity and regular contact may afford a captive pool of potential victims." *Id.* at 760. It does not follow, however, that employers are vicariously liable for all workplace harassment. "[S]omething more than the employment relation itself" must be established before the employer will be saddled with liability for the employee's misbehavior. *Id.*

Ellerth went on to discuss two different situations in which the employer and misbehaving employee have "something more than the employment relation" sufficient to give rise to vicarious liability. One such class of cases is that in which, in the course of creating or maintaining a hostile work environment, "a supervisor takes a tangible employment action against the subordinate," *id.*, because

> [w]hen a supervisor makes a tangible employment decision, there is assurance the injury could not have been inflicted absent the agency relation. . . . The supervisor has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control.
>
> . . . .
>
> For these reasons [among others], a tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer. Whatever the exact contours of the

> aided in the agency relation standard, its requirements will always be met when a supervisor takes a tangible employment action against a subordinate.

Id. at 761-63; *see also Jin v. Metro. Life Ins. Co.*, 310 F.3d 84, 92 (2d Cir. 2002) (quoting *Ellerth*, 524 U.S. at 761-62).

The Court therefore held that if behavior illegal under Title VII culminates in a supervisor's tangible employment action, the employer will, *ipso facto*, be vicariously liable for it. "A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Id.* at 761. The tangible employment action is "the means by which the supervisor brings the official power of the enterprise to bear on subordinates." *Id.* at 762. It is the use of the economic power of the employer exercised by the employee to whom that power has been delegated that renders the employer liable. *See id.* And it seems unlikely that an employment action with economic dimensions taken by one employee with respect to another would entirely escape the knowledge of the employer's managers.

There is a second class of cases where the agency relationship between employer and supervisor facilitates the creation of a hostile work environment, *Ellerth*, 524 U.S. at 763; *Faragher*, 524 U.S. at 803, albeit in a "less obvious" way, *Ellerth*, 524 U.S. at 763. In cases in which "supervisor harassment . . . does not culminate in a tangible employment action," *id.*, the employer may also be held vicariously liable for the supervisor's harassing behavior, but such liability is

not established simply by establishing that the misbehaving employee is the victim's supervisor; the "risk of [imposing] automatic liability [in these situations] is high," *Faragher*, 524 U.S. at 804.

To fashion a rule of vicarious liability to apply to such cases, the Court looked not only to agency principles, but also to "other considerations" of Title VII, *Ellerth*, 524 U.S. at 764, especially "Title VII's . . . basic policies of encouraging forethought by employers and saving action by objecting employees," *id.* at 764; *Faragher*, 524 U.S. at 807. The Court concluded that where a tangible employment action is not involved:

> [the] employer is [nonetheless] subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate . . . authority over the employee. [But in such cases] a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. . . . The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Ellerth, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

The existence of a tangible employment action thus affects whether the affirmative defense is available, but it does not affect the preliminary assessment of whether the employer may be held vicariously liable for the actions of a misbehaving employee. Vicarious liability, whether automatic or subject to the affirmative defense, depends on whether the power— economic *or otherwise*, of the harassing employee over the subordinate victim given by the employer to the harasser—enabled the harasser, or materially augmented his or her ability, to create or maintain the hostile work environment.

"It is precisely because the supervisor is understood to be clothed with the employer's authority that he is able to impose unwelcome sexual conduct on subordinates." *Ellerth*, 524 U.S. at 763 (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 77 (1986) (Marshall, J., concurring in judgment) (internal punctuation omitted)). "[A] supervisor's power and authority invests his or her harassing conduct with a particular threatening character, and in this sense, a supervisor always is aided by the agency relation." *Id.* "[T]he victim[, moreover,] may well be reluctant to accept the risks of blowing the whistle on a superior." *Faragher*, 524 U.S. at 803.

We conclude from facts undisputed in the record on this appeal that Connolly's authority over Mack, bestowed upon him by Otis, enabled him, or materially augmented his ability, to impose a hostile work environment on her.[4] Under the

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4. The existence and extent of such conduct, as opposed to the relationship among Otis, Connolly and Mack, is of course hotly disputed.

rules established by *Ellerth* and *Faragher*, Connolly was therefore Mack's supervisor for purposes of Title VII analysis. Not only did he direct the particulars of each of Mack's work days, including her work assignments, he was the senior employee on the work site. He therefore possessed a special dominance over other on-site employees, including Mack, arising out of their remoteness from others with authority to exercise power on behalf of Otis. There was no one superior to Connolly at 200 Park whose continuing presence might have acted as a check on Connolly's coercive misbehavior toward other Otis employees there. Otis may therefore, subject to the affirmative defenses recognized in *Ellerth* and *Faragher*, be held vicariously liable for Connolly's creation of a hostile work environment for Mack.

The district court concluded to the contrary that Connolly possessed an insufficient amount of authority over Mack to be classified as her supervisor for these purposes. *Mack*, 2001 WL 1636886, at *6-*7, 2001 U.S. Dist. LEXIS 20917, at *19-*24. In doing so, the court relied in large measure on *Parkins v. Civil Constructors of Illinois, Inc.*, 163 F.3d 1027 (7th Cir. 1998). *See Mack*, 2001 WL 1636886, at *6-*7, 2001 U.S. Dist. LEXIS 20917, at *19-*24. According to *Parkins*,

> it is manifest that the essence of supervisory status is the authority to affect the terms and conditions of the victim's employment. This authority primarily consists of the power to hire, fire, demote, promote, transfer, or discipline an employee. Absent an entrustment of at least some of this authority, an employee does not qualify as a supervisor for purposes [of] imputing liability to the employer.

163 F.3d at 1034.[5] It is undisputed that Connolly had no such authority with respect to Mack. The district court therefore concluded that Connolly was not Mack's supervisor and that Otis therefore could not be held vicariously liable for Connolly's misbehavior, if any.

We disagree. The *Parkins* test for determining who is a supervisor focuses on those attributes of an employee that enable him or her to take tangible employment actions with respect to subordinates: "the power to hire, fire, demote, promote, transfer, or discipline an[other] employee." *Parkins*, 163 F.3d at 1034. But as we have seen, *Ellerth* and *Faragher* hold that an employer may be vicariously liable even for the misbehavior of employees who do *not* take tangible employment actions against their subordinate victims. The question in such cases is not whether the employer gave the employee the authority to make economic decisions concerning his or her subordinates. It is, instead, whether

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5. The district court also cited *Trigg v. New York City Transit Auth.*, No. 99-CV-4730, 2001 WL 868336, at *7, 2001 U.S. Dist. LEXIS 10825, at *22 (E.D.N.Y. July 26, 2001) (adopting the *Parkins* definition of supervisor as one who has "the power to hire, fire, demote, promote, transfer, or discipline an employee"), *aff'd*, No. 01-9104, 2002 WL 1900463, 2002 U.S. App. LEXIS 17355 (2d Cir. Aug. 16, 2002); *Jackson v. T & N Van Serv.*, 86 F.Supp.2d 497, 501 (E.D. Pa. 2000) (citing with approval the *Parkins* definition of supervisor); and *Mikels v. City of Durham*, 183 F.3d 323, 334 (4th Cir. 1999) (considering, in concluding that the allegedly harassing employee was not the plaintiff's supervisor, that the employee did not have the power to take tangible employment actions against the plaintiff), in support of the test it employed to determine whether Connolly was Mack's supervisor. *Mack*, 2001 WL 1636886, at *7, 2001 U.S. Dist. LEXIS 20917, at *21-*22.

the authority given by the employer to the employee enabled or materially augmented the ability of the latter to create a hostile work environment for his or her subordinates. We therefore conclude that the authority that renders a person a supervisor for purposes of Title VII analysis is broader than that reflected in the *Parkins* test.

To be sure, other courts have adopted the *Parkins* definition of supervisor.[6] For the reasons set forth above, however, we agree with those courts that have not defined supervisor so narrowly. *See, e.g., Dinkins v. Charoen Pokphand USA, Inc.*, 133 F. Supp. 2d 1254, 1266 (M.D. Ala. 2001) ("[A]n employee is a supervisor or 'agent' for purposes of Title VII if he has the actual authority to . . . direct another employee's day-to-day work activities in a manner that may increase the employee's workload or assign additional or undesirable tasks."); *see also Kent v. Henderson*, 77 F. Supp. 2d 628, 634 (E.D. Pa. 1999) (considering whether the employee has the authority to "affect [the victim's] daily work activities" in determining whether the employee could be considered the victim's supervisor).

We also draw support from the Equal Employment Opportunity Commission ("EEOC") enforcement guidelines. In discussing employers' vicarious liability, the guidelines state that "[a]n individual qualifies as an employee's 'supervisor' if: (a) the individual has authority to undertake or recommend tangible employment decisions affecting the employee; *or* (b) [t]he individual has authority to direct the employee's daily work activities." EEOC Enforcement

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6. *See supra* note 5.

Appendix A

Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors, 8 FEP Manual (BNA) 405:7654 (1999) (emphasis in original). While we are not bound by enforcement guidelines, they are entitled to respect to the extent that they are persuasive. *See Jin*, 310 F.3d at 94-95 (relying on an EEOC Enforcement Guidance as persuasive authority); *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (agency interpretations of ambiguous statutes, contained in "opinion letters . . . policy statements, agency manuals, and enforcement guidelines . . . lack the force of law" but are "entitled to respect . . . to the extent that those interpretations have the power to persuade") (citation and internal quotation marks omitted); *McMenemy v. City of Rochester*, 241 F.3d 279, 284 (2d Cir. 2001) (finding persuasive the EEOC's interpretation of Title VII's retaliation clause). For the reasons discussed above, we find the EEOC's definition of "supervisor" in this context to be persuasive.

It is uncontested that Connolly was the senior employee regularly on site and that, as the mechanic in charge, he had and exercised the authority to make and oversee the daily work assignments of the mechanics and mechanics' helpers at 200 Park, including Mack. We conclude that, as a matter of law, Connolly was Mack's supervisor for purposes of imputing liability to Otis and that Otis may be vicariously liable for Connolly's acts toward Mack that violate Title VII. But because Connolly's harassment did not involve a tangible employment action, Otis cannot be held vicariously liable if Otis can establish the affirmative defense set forth in *Ellerth* and *Faragher*.

2. Otis's Affirmative Defense. It is undisputed that Connolly's creation of a hostile work environment for Mack did not culminate in a tangible employment action rendering Otis automatically liable for his misbehavior.[7] As noted repeatedly above, in the absence of such a tangible employment action, Otis is entitled to an affirmative defense "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise." *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

One way for employers to demonstrate that they exercised reasonable care is to show that they had an anti-harassment policy in place:

> An employer need not prove success in preventing harassing behavior in order to demonstrate that it exercised reasonable care in preventing and

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7. Mack has argued that she was constructively discharged as a result of the hostile work environment that Connolly created. But a constructive discharge does not constitute a tangible employment action for present purposes. *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 294 (2d Cir. 1999), *cert. denied*, 529 U.S. 1107 (2000).

Mack does not allege that she was subjected to any other tangible employment action. Mack testified at her deposition that "[t]owards the end when things got bad with Connolly he gave me very little [overtime]." Mack Dep. at 109. **(A 469)** Mack does not argue, however, that this constituted a tangible employment action, and we therefore do not consider whether it did.

> correcting sexually harassing conduct. Although not necessarily dispositive, the existence of an anti-harassment policy with complaint procedures is an important consideration in determining whether the employer has satisfied the first prong of this defense.

Caridad v. Metro-North Commuter R.R., 191 F.3d 283, 295 (2d Cir. 1999), *cert. denied*, 529 U.S. 1107 (2000). Otis had a "Policy on Harassment in the Workplace," and Mack concedes that she knew about it. The critical question is therefore whether Mack availed herself of the avenues that the policy provided through which she might have alerted Otis to her situation.

Otis's policy requires aggrieved employees to inform their "supervisor, unless he/she is the alleged harasser." Otis Elevator Co. Policy on Harassment in the Workplace. Mack testified at her deposition that in November 1999, she repeatedly complained to Gallina, Connolly's supervisor, and that she asked Gallina to transfer her to a different department so that she would not have to work with Connolly. Mack says she told Gallina that she was "plagued with a lot of sexist issues with [Connolly]," Mack Dep. at 86, and that Connolly was "always making rude and sexist comments" to her, *id.* at 205. There is thus evidence in the record from which a reasonable trier of fact could conclude that Mack did not "fail[ ] to take advantage" of Otis's harassment complaint procedures. *Ellerth*, 524 U.S. at 765.

Appendix A

II. Constructive Discharge Claim

The district court also concluded that Mack failed to establish a triable issue of fact with respect to her constructive discharge claim. "Constructive discharge of an employee occurs when an employer, rather than directly discharging an individual, intentionally creates an intolerable work atmosphere that forces an employee to quit involuntarily. Working conditions are intolerable if they are so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." *Whidbee v. Garzarelli Food Specialties, Inc.*, 223 F.3d 62, 73 (2d Cir. 2000) (citation and internal quotation marks omitted). To prevail on a claim of constructive discharge, a plaintiff must show "deliberate action on the part of the employer. . . . [S]omething beyond mere negligence or ineffectiveness is required." *Id.* at 74.

The district court concluded that Mack had failed to provide evidence of intentional or deliberate action by Otis that forced her to resign. *Mack*, 2001 WL 1636886, at *11, 2001 U.S. Dist. LEXIS 20917, at *38. We agree. It is uncontested that once Otis officials were made aware of Mack's complaints, they immediately began an investigation. They arranged a meeting with Mack and offered to do precisely what she had asked, to transfer her to a place elsewhere in midtown Manhattan — Rockefeller Center — where she would be beyond Connolly's power. Mack simply refused the transfer and failed to return to work. As the district court concluded, no reasonable fact finder could construe this as a constructive discharge.

Appendix A

III. Failure to Represent Claim

The district court also correctly concluded that Mack failed to demonstrate that Local 1 breached its duty to represent her. *Mack*, 2001 WL 1636886, at *13-*14, 2001 U.S. Dist. LEXIS 20917, at *43-*47. To establish a breach of duty of fair representation "[t]he union's conduct must, first, have been arbitrary, discriminatory or in bad faith, and second, it must have seriously undermine[d] the arbitral process." *Barr v. United Parcel Serv.*, 868 F.2d 36, 43 (2d Cir. 1989) (citations and internal quotation marks omitted). There is no evidence that would support a finding that the Union acted arbitrarily or in bad faith in permitting the alleged violation of the CBA to go uncorrected. The CBA states that an employee seeking to file a grievance "shall first discuss the issue with his/her supervisor and/or business agent." CBA at 35. To request the Union to file a grievance against a Union member, the CBA instructs that "a written charge . . . shall be filed with the Executive Board." Orriga Dep. at 43-44.

Mack alleges that she repeatedly complained of Connolly's conduct to Union shop steward Craig Reiff. But Mack also testified that she never asked Reiff to file a grievance for her, and that instead she asked him to help reassign her to a different location. Mack failed to comply with the Union's grievance procedures by not requesting that a grievance be filed against Otis or filing a written charge against Connolly. There is no evidence that the Union's actions in failing to file a grievance were "arbitrary, discriminatory, or in bad faith." Local 1 never filed a grievance because Mack never requested that it do so.

IV. Retaliation Claim

Lastly, the district court concluded, correctly in our view, that Mack did not successfully establish a prima facie case of retaliation against either Otis or Local 1. *Mack*, 2001 WL 1636886, at *12, 2001 U.S. Dist. LEXIS 20917, at *39-*42. In order to establish such a prima facie case, a plaintiff must demonstrate that "(1) she was engaged in an activity protected under Title VII; (2) the employer was aware of plaintiff's participation in the protected activity; (3) the employer took adverse action against plaintiff; and (4) a causal connection existed between the plaintiff's protected activity and the adverse action taken by the employer." *Gordon v. New York City Bd. of Educ.*, 232 F.3d 111, 116 (2d Cir. 2000) (citation omitted).

Mack alleges that she engaged in protected activity by reporting Connolly's conduct to, *inter alios*, Gallina and Reiff. She alleges that she was subjected to several adverse employment actions because of this activity, including escalation of the hostile work environment, constructive discharge, Local 1's refusal to file a formal grievance for her, and Otis's threat to transfer Mack to a different location.

Neither these assertions nor anything else we have found in the record would support a reasonable fact-finder's conclusion that Connolly's behavior toward her was retaliatory. Mack has not elicited any evidence to support the notion that Connolly was aware of her complaints to Gallina or Reiff, or that as a result of this awareness he engaged in or escalated the hostile work environment to which he subjected her. As noted, Local 1 did not file a

grievance for Mack while she was employed by Otis because she did not cooperate with Union officials or follow Union procedures with respect to any such grievance. Finally, Mack's own testimony permits no inference that Otis's offer to transfer Mack away from Connolly to a different location was anything other than an attempt to ameliorate the situation.

CONCLUSION

For the foregoing reasons, the district court's judgment dismissing Mack's complaint is affirmed except for her hostile work environment claim under Title VII and New York State and City law, as to which the judgment is vacated and the case remanded to the district court for further proceedings consistent with this opinion.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED DECEMBER 18, 2001

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

00 Civ. 7778 (LAP)

YASHARAY MACK,

Plaintiff,

- v. -

OTIS ELEVATOR COMPANY and
LOCAL 1 INTERNATIONAL UNION
OF ELEVATOR CONSTRUCTORS,

Defendants.

MEMORANDUM AND ORDER

LORETTA A. PRESKA, United States District Judge:

Plaintiff Yasharay Mack ("Mack") brings this action against defendants Otis Elevator Company ("Otis") and Local 1 International Union of Elevator Constructors ("Local 1") pursuant to 42 U.S.C. § 1981, Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, 42 U.S.C. § 2000e *et seq.*, the New York State Human Rights Law, N.Y. Exec. Law § 296 *et seq.* ("NYSHRL"), and the New York City Human Rights Law § 8-107 *et seq.* ("NYCHRL"). Mack

alleges that she was subjected to a racially and sexually hostile work environment and also asserts claims for retaliation and constructive discharge. Further, Mack appears to allege breach of duty of fair representation against Local 1 for its failure to protect her from harassment. Defendants move for: (1) summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure; (2) preclusion of evidence not properly disclosed during discovery; and (3) a protective order and attorneys fees. For the reasons set forth below, the motions for summary judgment are granted.

BACKGROUND

Mack, an African-American female, applied through Local 1 for employment as an elevator mechanic "helper" in or about May or June 1999. (Defendants' Rule 56.1 Statement ("Defts. Rule 56.1 Stmt.") ¶ 9; Plaintiff's Rule 56.1 Counterstatement ("Pltfs. Rule 56.1 Stmt.") ¶ 9). She was referred to and hired by Otis on or about July 19, 1999. (*Id.*; Am. Compl. ¶ 13).

At all times relevant to the amended complaint, Otis had a policy in place prohibiting discrimination and all forms of racial or sexual harassment, including both quid pro quo and hostile work environment. (Defts. Rule 56.1 Stmt. ¶ 1; Pltfs. Rule 56.1 Stmt. ¶ 1). The policy describes how employees may bring discrimination or harassment issues to the attention of management. (*Id.*). The policy is distributed to all new Otis employees, who are also trained with respect to the policy. (Defts. Rule 56.1 Stmt. ¶¶ 2-3; Pltfs. Rule 56.1 Stmt. ¶¶ 2-3). Further, Otis employees receive annual sexual harassment prevention training, which provides

information on the various procedures available to Otis employees who wish to assert complaints of harassment or discrimination. (Defts. Rule 56.1 Stmt. ¶¶ 3-4; Pltfs. Rule 56.1 Stmt. ¶¶ 3-4). Under these procedures, Otis employees may raise complaints of discrimination or harassment with: (1) their supervisors; (2) the Human Resources Department, headed in the New York City area by Paul Barrett ("Barrett"); (3) a system known as DIALOG; or (4) the corporate ombudsperson. (Defts. Rule 56.1 Stmt. ¶ 5; Pltfs. Rule 56.1 Stmt. ¶ 5).

Local 1 also had mechanisms in place to receive and investigate complaints of harassment or discrimination, set forth in the Collective Bargaining Agreement between Local 1 and Otis ("CBA") and in Local 1's By-laws. (Defts. Rule 56.1 Stmt. ¶ 6; Pltfs. Rule 56.1 Stmt. ¶ 6). The CBA states in pertinent part:

"SECTION I — Recognition of the Union and of the Company's Responsibility

* * *

(A) Employment Practices

> The Company and the Union mutually agree that they will comply and cooperate with all Federal, State and/or Local laws, codes, rules and ordinances prohibiting discrimination based on race, creed, color, sex, national origin, age, sexual orientation, marital status or disability. . . .

Appendix B

SECTION VIII — Arbitration

A. Step 1. If an Employee has a complaint about the application of any portion of this Agreement, the Employee shall first discuss the issue with his/her supervisor and/or business agent within ten (10) days after the cause of the grievance is known or should reasonably have been known. The Employee's supervisor shall respond, either verbally or in writing, to the grievant no later than three (3) business days after this discussion."

(Defts. Rule 56.1 Stmt. ¶ 7; Pltfs. Rule 56.1 Stmt. ¶ 7).[1] Local 1's By-laws state in pertinent part:

"Article XXIV — Charges, Trials and Appeals

When a member of this Local desires to charge a fellow member with having violated any of the provisions of this Constitution and By-Laws, a written charge stating the nature of the violation, including time, place and date, the name of the person making the complaint, and the names of all the witnesses, shall be filed with the Executive Board and read off at the next meeting. Charges must be filed within two weeks of the commission of an offense, or if the offense is of a secret nature, within two weeks of the commission of an offense,

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1. While the parties purport to agree that the "Arbitration" clause of the CBA is located in Section VII on pages 38-39, it is actually located in Section VIII on page 35.

> or if the offense is of a secret nature, within two weeks from the time the charging party first obtained knowledge of the offense. The member against whom a charge is filed shall be served with a copy of the charge by registered mail . . . and given at least fifteen (15) days written notice by the Recording Secretary of the Local Union to appear before the Executive Board. The trial shall proceed on the date set unless adjourned for good cause.
>
> The Executive Board shall sit as a trial jury. . . ."

(Defts. Rule 56.1 Stmt. ¶ 8; Pltfs. Rule 56.1 Stmt. ¶ 8).

As with all new employees, Mack was informed upon her arrival at Otis of its policy on discrimination and harassment. (Defts. Rule 56 .1 Stmt. ¶ 10; Pltfs. Rule 56.1 Stmt. ¶ 10). Barrett specifically instructed Mack to contact him if she experienced any difficulties at the work site. (*Id.*). Further, Mack was provided with copies of the "rules and regulations" of Local 1 and the CBA, which outlined the procedures for bringing complaints to the attention of Local 1. (Defts. Rule 56.1 Stmt. ¶ 11; Pltfs. Rule 56.1 Stmt. ¶ 11). Local 1 instructed Mack to contact Union officials if she had any questions about the materials that were provided to her. (*Id.*).

In September 1999, Mack was assigned as a helper in the maintenance department at 200 Park Avenue in New York ("200 Park"). (Defts. Rule 56.1 Stmt. ¶ 9; Pltfs. Rule 56.1 Stmt. ¶ 9). At various times during the course of Mack's

employment, Otis management at 200 Park included Michael Donohue, Gerald Mazur and Phillip Gallina ("Gallina"). (Defts. Rule 56.1 Stmt. ¶ 12; Pltfs. Rule 56.1 Stmt. ¶ 12). Gallina was assigned to the maintenance department. (*Id.*). Mack worked as a helper to a number of Otis mechanics: Richard Morrison ("Morrison"), Gerald Lombardo ("Lombardo"), James Macias, Edward Caban ("Caban"), Chris Moore and James Connolly ("Connolly"). (Defts. Rule 56.1 Stmt. ¶ 13; Pltfs. Rule 56.1 Stmt. ¶ 13). When plaintiff arrived at 200 Park, Steven Hook ("Hook") was also a mechanic helper who became a temporary mechanic soon thereafter. (*Id.*). All of these individuals were hourly employees and represented by Local 1. (*Id.*).

The parties vigorously dispute the roles and responsibilities of the mechanics employed at the maintenance department of 200 Park. Connolly was designated the "mechanic in charge." (Defts. Rule 56.1 Stmt. ¶ 14; Pltfs. Rule 56.1 Stmt. ¶ 14). The parties agree that under the CBA, when five or more employees are assigned to a service job, one of them must be designated the "mechanic in charge" who has at least three responsibilities: "(1) to allocate the work assigned by management among the mechanics and helpers, including himself; (2) to check the quality of the work; and (3) to monitor safety in the workplace." (Defts. Rule 56.1 Stmt. ¶ 14; Pltfs. Rule 56.1 Stmt. ¶ 14). Otis and Local 1 assert that the "mechanic in charge" distributes work assignments as received from the customer or Otis management but lacks the ability to: (1) "hire, discharge, promote, demote, discipline or otherwise affect the terms and conditions of other employees' employment with Otis"; (2) "evaluate other employees' performance for purposes of

increasing or decreasing wages their wages"; or (3) "affect in any way the terms and conditions of other employees' employment with [Otis]." (Defts. Rule 56.1 Stmt. ¶ 15). Mack disputes that the "mechanic in charge" lacked the ability to carry out those tasks. (Pltfs. Rule 56.1 Stmt. ¶ 15). Further, Mack disputes Otis' and Local 1's assertions that: (1) management assigned overtime work in the maintenance department at 200 Park; and (2) the "mechanic in charge" was simply assigned the "clerical responsibility for maintaining the overtime list." (Defts. Rule 56.1 Stmt. ¶ 16; Pltfs. Rule 56.1 Stmt. ¶ 16).

Mack alleges that, from the point she began her employment at Otis, she was subject to "numerous derogatory, unwelcome and offensive sexual and gender related" incidents: (1) she was told that she "had a 'fantastic ass', luscious lips and beautiful eyes"; (2) Connolly, her alleged supervisor, refused to train her because she was female and told her to "just stand there and look pretty"; (3) she was subject to "repeated comments that 'women should not be in the business'"; (4) Connolly undressed in front of her at work and touched his private parts; and (5) Connolly told Mack about his "sexual exploits on the job," including showing Mack a calender "marked with the times he allegedly had sexual relations while on the job." (Affidavit of Yasharay Mack sworn to on July 19, 2001 ("Mack Aff.") ¶ 5). Mack alleges that, in September 1999, she was "subject to an unwanted sexual physical attack" by Connolly, where he pulled Mack onto his lap and touched her buttocks in the presence of Morrison, Hook, Moore and Lombardo. (*Id.* ¶ 6).

Mack further claims that she was "subject to a pattern and practice of derogatory and offensive comments and slurs used to intentionally discriminate against [her] because of her race." (Am.Compl.¶ 20). Specifically, she states that Connolly made repeated comments about her being "colored" and that Lombardo referred to her as a "little nigger" and told her that "[s]pooks should not be in the business." (*Id.*). Mack asserts that Connolly refused to give her overtime when "others not similarly situated to [her] in terms of race and/or gender were regularly offered overtime." (*Id.* ¶ 22). Mack alleges that, after she complained to Otis and Local 1, Connolly threatened her that "if she crossed him he would use his connections with [Otis and Local 1] to interfere with the terms of her employment" and would "not be offered the option of overtime that other employees were regularly offered." (*Id.* ¶¶ 23-24).

Between July 1999 and May 17, 2000, Mack alleges that she "made repeated complaints regarding the harassment and abuse to Supervisors and Management of [Otis] and with [Local 1] which were summarily dismissed and/or never investigated." (*Id.* ¶ 21). Mack alleges that she complained about the alleged discriminatory conduct to Local 1 shop steward Craig Reiff ("Reiff"), Local 1 Business Manager John Green ("Green"), Caban, mechanic Vincent DeCaro ("DeCaro") and Connolly himself. (Pltfs. Rule 56.1 Stmt. ¶¶ 18, 19, 30, 32). In contrast, Otis and Local 1 assert that in this time period Mack had "absolutely no contact with [Local 1] or any of its officers regarding her employment with [Otis]," "made no complaints to Mr. Barrett concerning her employment or her treatment by fellow employees" and "with the exception of one or two alleged vague conversations

with Mr. Gallina in November 1999, she never made any complaints to any Otis managers or supervisors concerning her treatment in the workplace." (Defts. Rule 56.1 Stmt. ¶ 18).

On May 17, 2000, Local 1 Secretary Treasurer Anthony J. Orrigo ("Orrigo") received a telephone call from an individual representing himself to be Mack's father who indicated that he wished to file a complaint based upon the alleged incident where Connolly attempted to pull Mack onto his lap. (Defts. Rule 56.1 Stmt. ¶ 21; Pltfs. Rule 56.1 Stmt. ¶ 21). Orrigo responded that he would refer the matter immediately to the area Business Agent, who was subsequently notified. (Defts. Rule 56.1 Stmt. ¶ 22; Pltfs. Rule 56.1 Stmt. ¶ 22). Orrigo later spoke with Mack, who told him for the first time that she had been subject to racial and sexual harassment in the workplace. (Defts. Rule 56.1 Stmt. ¶ 25; Pltfs. Rule 56.1 Stmt. ¶ 25).[2] Mack's father also called the Otis branch manager responsible for 200 Park, Steven Sheppke ("Sheppke"), to notify him that Mack was having difficulties with one of the mechanics on the site. (Defts. Rule 56.1 Stmt. ¶ 27; Pltfs. Rule 56.1 Stmt. ¶ 27). Prior to that time, neither Sheppke nor Barrett had ever received any complaints from Mack or her father concerning problems on the worksite. (*Id.*) Sheppke immediately contacted Barrett and relayed the allegations raised by Mack's father. (Defts. Rule 56.1 Stmt. ¶ 28; Pltfs. Rule 56.1

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2. In paragraph 18 of her Rule 56.1 counterstatement, Mack asserts that she had complained to Orrigo about the alleged discriminatory conduct prior to their conversation on May 17. In paragraph 25, however, she admits that this conversation was "the first time" that she told him about her "difficulties in the workplace."

Stmt. ¶ 28). Barrett contacted Mr. Mack shortly thereafter. (Defts. Rule 56.1 Stmt. ¶ 29; Pltfs. Rule 56.1 Stmt. ¶ 29).

The next day, Mack, her father and representatives from Local 1 and Otis held a meeting, where Mack elaborated on her allegations. (Defts. Rule 56.1 Stmt. ¶¶ 30-31; Pltfs. Rule 56.1 Stmt. ¶¶ 30-31). Barrett explained that "an investigation of [Mack's] allegations was underway and that under no circumstances would any discriminatory conduct be tolerated," and Orrigo agreed on behalf of Local 1. (Defts. Rule 56.1 Stmt. ¶ 33; Pltfs. Rule 56.1 Stmt. ¶ 33). Barrett also offered to transfer Mack to a different location, but she refused. (*Id.*) It is undisputed that after the meeting, Mack did not return to work with Otis, failed to accept a transfer to another work location, failed to request an assignment to another Local 1 employer and failed to cooperate in Local 1's investigation of her claims. (Defts. Rule 56.1 Stmt. ¶ 34; Pltfs. Rule 56.1 Stmt. ¶ 34).

DISCUSSION

I. Summary Judgment Standard

Under Rule 56, summary judgment shall be rendered if the pleadings, depositions, answers, interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *See* Fed. R. Civ. Proc. 56(c); *Anderson v. Liberty Lobby*, 477 U.S. 242, 250 (1986). An issue of fact is genuine when "a reasonable jury could return a verdict for the nonmoving party," and facts are material to the outcome of the litigation

if application of the relevant substantive law requires their determination. *Anderson*, 477 U.S. at 248.

The moving party has the initial burden of "informing the district court of the basis for its motion" and identifying the matter that "it believes demonstrate[s] the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

The substantive law determines the facts which are material to the outcome of a particular litigation. *Anderson*, 477 U.S. at 250; *Heyman v. Commerce & Indus. Ins. Co.*, 524 F.2d 1317, 1320 (2d Cir. 1975). In determining whether summary judgment is appropriate, a court must resolve all ambiguities, and draw all reasonable inferences against the moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986) (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

If the moving party meets its burden, the burden then shifts to the non-moving party to come forward with "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. Proc. 56(e). The non-moving party must "do more than simply show there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U .S. at 586. Only when it is apparent, however, that no rational finder of fact "could find in favor of the non-moving party because the evidence to support its case is so slight" should summary judgment be granted. *Gallo v. Prudential Residential Servs. Ltd. Partnership*, 22 F.3d 1219, 1223 (2d Cir. 1994).

Appendix B

II. Title VII Claims

Under Title VII, it is unlawful "for an employer . . . to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2a. The Court of Appeals continues to adhere to the allocation of the burden of production articulated by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Fisher v. Vassar College*, 114 F.3d 1332, 1335 (2d Cir. 1997) (en banc), *cert. denied*, 522 U.S. 1075 (1998). To establish a *prima facie* Title VII claim, plaintiff must show (1) membership in a protected class; (2) that she was qualified for her position and was performing her job duties at the reasonable expectations of the employer; (3) that she suffered an adverse employment action; and (4) that other unprotected workers were retained or were not otherwise affected by the policy. *McDonnell Douglas*, 411 U.S. at 802; *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981). Once plaintiff has established a *prima facie* case, the burden shifts to the defendant to offer a "legitimate, non-discriminatory reason" for the adverse employment action it has taken." *Burdine*, 450 U.S. at 254. Once the defendant has articulated a legitimate reason, the presumption of discrimination is no longer operative, and the burden shifts back to the plaintiff to "point to sufficient evidence to reasonably support a finding that she was harmed by the employer's illegal discrimination." *Fisher*, 114 F.3d at 1337.

Appendix B

The standards under Title VII apply equally to Mack's claims under Section 1981, NYSHRL and NYCHRL. *Tappe v. Alliance Capital Mgt. L.P.*, No. 01 Civ. 2068 (SAS), 2001 WL 1297799, at *2 (S.D.N.Y. Oct. 25, 2001) (citing *Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 565 n.1 (2d Cir. 2000)); *Nweke v. Prudential Ins. Co.*, 25 F. Supp. 2d 203, 225 (S.D.N.Y. 1998).

In her complaint, Mack appears to assert four types of claims: hostile work environment, constructive discharge, retaliation and breach of duty of fair representation by Local 1. I address each in turn.

A. Hostile Work Environment

To survive summary judgment on her Title VII claim of hostile work environment harassment, Mack must plead a *prima facie* case by establishing two elements: "(1) that her workplace was permeated with discriminatory intimidation that was sufficiently severe or pervasive to alter the conditions of her work environment, and (2) that a specific basis exists for imputing the conduct that created the hostile environment to the employer." *Van Zant v. KLM Royal Dutch Airlines*, 80 F.3d 708, 715 (2d Cir. 1996) (citation omitted); *Robles v. Cox & Co.*, 154 F. Supp. 2d 795, 803-04 (S.D.N.Y. 2001). I find that, even if a hostile work environment existed at Otis, there is no basis for imputing the conduct that created the hostile work environment to Otis.

Liability may be imputed to an employer for the existence of a hostile work environment whether the alleged harasser is the plaintiff's supervisor or merely her co-worker. The standard of liability for each of these situations, however, is different.

Appendix B

1. Harassment by Supervisors

When a plaintiff accuses a supervisor of harassment, the employer's liability is presumed and can be avoided only by showing that: (1) the employer exercised reasonable care to prevent and promptly correct any sexual harassment by such supervisor; and (2) the employee unreasonably failed to avail herself of any corrective or preventative opportunities provided by the employer. *Quinn v. Green Tree Credit Corp.*, 159 F.3d 759, 767 (2d Cir. 1998) (citing *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998)).[3]

The Supreme Court has not specifically defined the term "supervisor" for purposes of determining an employer's liability for a hostile work environment but described the power to supervise as "to hire and fire, and to set work schedules and pay rates." *Faragher*, 524 U.S. at 803.[4] Numerous lower courts, however, have since elaborated upon

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3. If the supervisor's harassment culminated with a "tangible employment action," the employer may not invoke this affirmative defense. *Ellerth*, 524 U.S. at 765. Constructive discharge, however, is not considered a "tangible" employment action for these purposes. *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 294 (2d Cir. 1999).

4. *See, e.g.*, Blackman, Note, *The* Faragher *and* Ellerth *Problem: Lower Courts' Confusion Regarding the Definition of "Supervisor"*, 54 Vand. L. Rev. 123, 124 (2001) ("Although [*Faragher* and *Ellerth*] revised and clarified the proper standard of employer liability in hostile environment claims, they also have been a source of confusion for lower courts attempting to decide exactly which employees qualify as supervisors.").

the scope of the term, recognizing that one must possess a significant amount of authority over others to be construed legally as a "supervisor." For example, in *Parkins v. Civil Constructors, Inc.*, 163 F.3d 1027, 1033 (7th Cir. 1998), the court noted the long-standing distinction "between low-level supervisors who were the equivalent of co-workers and supervisors whose authority and power was sufficient to make consequential employment decisions affecting the subordinate, such that the supervisor was effectively acting on the employer's behalf." The court observed that post-*Faragher* and *Ellerth* cases "indicate that whether an individual is 'a supervisor with immediate (or successively higher) authority' is dependent upon whether his authority was of a substantial magnitude." *Id.* at 1034 (citing *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581, 592 (5th Cir. 1998); *Phillips v. Taco Bell Corp.*, 156 F.3d 884, 888 (8th Cir. 1998)). The court concluded that the alleged harassers could not be considered "supervisors":

> "[I]t is manifest that the essence of supervisory status is the authority to affect the terms and conditions of the victim's employment. This authority primarily consists of the power to hire, fire, demote, promote, transfer, or discipline an employee. Absent an entrustment of at least some of this authority, an employee does not qualify as a supervisor for purposes imputing liability to the employer.
>
> Applying this standard to the present case, it is clear that neither [of the alleged harassers] was a supervisor for purposes of imposing strict liability

> on the employer under Title VII. Both [of them] were laborers who were required to account for their time on a time card, were paid an hourly wage, and received overtime pay."

Id. at 1034; *see also, e.g.*, *Trigg v. New York City Transit Auth.*, No. 99 CV 4730 (ILG), 2001 WL 868336, at *7 (E.D.N.Y. July 26, 2001) (describing as a "sound statement" the Seventh Circuit's assertion in *Parkins* that supervisory status should consist of "the power to hire, fire, demote, promote, transfer, or discipline an employee");[5] *Jackson v. T & N Van Service*, 86 F. Supp. 2d 497, 501 (E.D. Pa. 2000) ("Defendants are correct in that 'the limited ability of employees to direct the work of crews or other small groups of workers does not equate to a supervisory position' for purposes of imputing liability to the employer."); *Mikels v. City of Durham*, 183 F.3d 323, 334 (4th Cir. 1999) ("[I]t is evident that any authority possessed by Acker over Mikels was at best minimal. . . . Acker's authority assuredly did not include the power to take tangible employment actions against Mikels and her rank-peers. At most it would involve the occasional authority to direct her operational conduct while on duty.").[6]

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5. As noted in *Trigg*, the Second Circuit "has not voiced an opinion on the criteria used to identify a supervisor versus a co-employee." 2001 WL 868336, at *7.

6. *But see Grozdanich v. Leisure Hills Health Center, Inc.*, 25 F. Supp. 2d 953, 972 (D. Minn. 1998) ("[I]t is evident that the Supreme Court views the term 'supervisor' as more expansive than as merely including those employees whose opinions are dispositive on hiring, firing, and promotion.").

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In the instant case, Mack fails to present any genuine issue of material fact as to whether Connolly can be construed as her "supervisor." The parties agree that Connolly was an hourly employee and a member of Local 1. (Defts. Rule 56.1 Stmt. ¶ 13; Pltfs. Rule 56.1 Stmt. ¶ 13). In her Rule 56.1 counter-statement, Mack disputes, *inter alia*, Otis' and Local 1's assertion that Connolly "does not have the power to hire, discharge, promote, demote, discipline or otherwise affect the terms and conditions of other employees' employment with Otis." (Defts. Rule 56.1 Stmt. ¶ 15; Pltfs. Rule 56.1 Stmt. ¶ 15). Mack, however, offers no evidence to support her contrary position. She refers to certain portions of Connolly's deposition testimony, but this testimony does not establish that Connolly had a sufficient level of authority over Mack to be construed legally as a "supervisor." Connolly testified that a mechanic-in-charge has "[m]ore responsibilities" than a mechanic. (Connolly Dep. at 6). He was required to: (1) "interact with building management to make sure their needs are being addressed promptly and courteously, make sure the maintenance and repairs are done in a timely fashion" (*id.*); (2) "make out the time tickets for just the maintenance department" (*id.* at 7); (3) tell the other mechanics "what had to be done" for a particular job (*id.* at 19);[7] (4) make statements "on what had to be done and who would be available to do it" with respect to overtime (*id.* at 21); (5) "advise mechanic helpers of certain work assignments" (*id.* at 20); and (6) "educate" helpers assigned to work with him, including assignments that he had with Mack. (*Id.* at 47). Connolly testified that no mechanic has ever refused an

7. Connolly described this responsibility as follows: "If there was [sic] five elevators shut down, it would be you take that and you take this and you would take that and you would take that." (*Id.*).

assignment from him—but if that were to happen, he would have to "talk to the shop steward or someone in-house to address the problem," rather than directly taking action himself. (*Id.* at 20). Thus, there is no evidence from which a jury could determine that Connolly had the requisite power to be construed as a "supervisor"—he could not hire, fire, promote, demote or discipline Mack. At most, he had "occasional authority to direct her operational conduct." *Mikels*, 183 F.3d at 334.[8]

Mack also fails to present any genuine issue of material fact as to whether Lombardo—to whom Mack attributes certain racial remarks—was her "supervisor." Lombardo was simply a mechanic at 200 Park assigned to work with Mack. (Lombardo Dep. at 16). Like Connolly, Lombardo was an hourly employee and had no ability to hire, fire, promote, demote or discipline Mack.

---

8. In her opposition brief, Mack cites to *Karibian v. Columbia University*, 14 F.3d 773, 775, 777-78 (2d Cir. 1994), and *Talada v. International Service System, Inc.*, 899 F.Supp. 936, 948 (N.D.N.Y. 1995) to support the proposition that "supervisory authority, actual or apparent, include [sic] the ability to determine the employee's day-to-day activities, the authority to alter the employees [sic] work schedule, assignments, give promotions and raises or to terminate an employee." (Pl. Br. at 10). Contrary to Mack's assertion, however, neither of those cases actually held that supervisory authority includes "the ability to determine the employee's day-to-day activities." Further, unlike here, there was no dispute in those cases the alleged harassers were, in fact, considered to be "supervisors." Finally, and in any event, both *Karibian* and *Talada* were decided before the Supreme Court decisions in *Faragher* and *Ellreth* and their progeny, which substantially define and narrow the definition of the term "supervisor" in a Title VII context.

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2. Harassment by Non-Supervisors

When a non-supervisor is alleged to have created the hostile or abusive environment, the employer will generally not be liable under federal law "unless the employer either provided no reasonable avenue of complaint or knew of the harassment but did nothing about it," *Quinn*, 159 F.3d at 766 (internal quotation marks omitted), or under state and city law if the plaintiff can prove that the employer "became a party to the [discriminatory act] by encouraging, condoning, or approving it," *DeWitt v. Lieberman*, 48 F. Supp. 2d 280, 293 (S.D.N.Y. 1999) (citation omitted).

With respect to the issue of whether Mack had a reasonable avenue of complaint available to her, it is undisputed that Otis has a written policy against sex discrimination and sexual harassment. (Pltfs. 56.1 Stmt. ¶ 1; Defts. 56.1 Stmt. ¶ 1). Mack has admitted that she was aware of such policy and has made no argument that this policy is inherently unreasonable. Therefore, liability for the alleged harassment cannot be imputed to Otis on this ground.

With respect to the issue of whether Otis knew of the harassment but did nothing about it, Mack cites *Distasio v. Perkin Elmer Corp.*, 157 F.3d 55 (2d Cir. 1998), a post-*Ellerth* and *Faragher* case. In *Distasio*, plaintiff claimed that she was subjected to a hostile work environment because she was sexually harassed by a co-worker for four years. *Id.* at 59. She reported the conduct on numerous occasions to her supervisor who failed to relay plaintiff's complaints to the Human Resources Department. *Id.* at 59, 61. The Court of Appeals observed that for liability to attach under

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Title VII, "an employer need not have actual knowledge of the harassment; an employer is considered to have notice of sexual harassment if the employer—or any of its agents or supervisory employees—knew or should have known about the conduct." *Id.* at 63 (citing *Murray v. New York Univ. College of Dentistry*, 57 F.3d 243, 249 (2d Cir. 1995)). The court noted that "agency principles" determine whether an official's knowledge can be imputed to the employer, *i.e.*, when:

> "(A) the official is at a sufficiently high level in the company's management hierarchy to qualify as a proxy for the company; or (B) the official is charged with a duty to act on the knowledge and stop the harassment; or (C) the official is charged with a duty to inform the company of the harassment."

Id. at 64 (citing *Torres v. Pisano*, 116 F.3d 625, 636-37 (2d Cir. 1997)). The court imputed liability to the company, Perkin Elmer, on this basis due to the fact that Perkin Elmer's own sexual harassment policy "specifically states that 'an employer is considered to have direct knowledge when an employee has complained directly to a supervisor, or Human Resources or has used any established complaint mechanism.'" *Id.*

Distasio also imputed the supervisor's knowledge of the sexual harassment to Perkin Elmer on an independent ground: the supervisor had "a responsibility to relay sexual harassment complaints to the company under the express policy promulgated by the company." *Id.* The court held that

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"[a]n employer will be liable based on the knowledge of an employee, who may or may not have management authority, if that employee 'has an official or strong *de facto* duty to act as a conduit to management for complaints about work conditions, or is responsible for relaying harassment complaints to the corporate hierarchy.'" *Id.* (citations omitted). The court found that such a duty existed because Perkin Elmer's policy instructed supervisors—once they have received a harassment complaint—to inform the Human Resources Department about the allegations within 24 hours of the reporting of the incident and to assist in any investigations. *Id.*

Mack asserts that *Distasio* is directly applicable to the instant case. She refers to Otis' harassment policy, which states:

> "If you believe that you are being harassed by an Otis employee, vendor, consultant or contractor, or if you observe harassment as defined in the policy, you should immediately notify Otis by taking one or more of the following actions; (1) inform your supervisor (unless he/she is the alleged harasser); (2) inform your Human Resources Representative; (3) contact the Workforce Diversity Manager, who handles harassment issues . . . ; (4) contact the "DIALOG" Administrator . . . ; (5) contact the Otis Ombudsman in the UK; or (6) contact the UTC Ombudsman."

(Pl. Br. at 12 (citing Def. Ex. 15)). Mack asserts she complained about the harassment to mechanics Caban, Lombardo and DeCaro and that at least two of them actually witnessed her being harassed. (*Id.* at 13-14). Mack describes all three men as her "supervisors." (*Id.*). Mack appears to be asserting, based upon Otis' harassment policy, two independent bases upon which liability could be imputed to Otis: (1) Caban, Lombardo and DeCaro, as Mack's purported supervisors, knew about the alleged harassment but failed to act; and (2) Caban, Lombardo and DeCaro—regardless of their alleged supervisory status—had "an official or strong *de facto* duty to act as a conduit to management for complaints about work conditions" or were "responsible for relaying harassment complaints to the corporate hierarchy."

I reject both arguments. First, Caban, Lombardo and DeCaro had no strong or *de facto* duty to act as a conduit to Otis for complaints about work conditions. Unlike in *Distasio*, Otis' harassment policy contains no provision stating that "an employer is considered to have direct knowledge when an employee has complained directly to a supervisor, or Human Resources or has used any established complaint mechanism." Second, it was undisputed in *Distasio* that the party which failed to report the harassment was plaintiff's supervisor. In this case, however, neither Caban nor DeCaro was Mack's supervisor for the same reasons described above as to why Lombardo was not her supervisor—*i.e.*, they were hourly employees represented by Local 1 and had no ability to hire, fire, promote, demote or discipline Mack. (Defts. Rule 56.1 Stmt. ¶ 13; Pltfs. Rule 56.1 Stmt. ¶ 13; Mack Dep. at 125-27). Third, the fact that Otis' harassment policy encourages all employees,

including non-supervisors, to report any observed harassment does not mean that the purported failure of Caban, Lombardo and DeCaro to do so allows the harassment to be imputed to Otis. As Otis points out in its reply brief, "[i]t would be anomalous if under *Ellerth* a [p]laintiff's failure to take advantage of multiple complaint procedures relieved the employer of liability, but her co-worker's failure to follow such procedures *on her behalf* imposed liability on the employer." (Otis Reply Br. at 8) (emphasis in original).

In addition to Caban, Lombardo and DeCaro, Mack also alleges that she complained to Gallina—a member of Otis management at 200 Park—about the harassment by Connolly, but he refused to take any corrective action on her behalf. (Mack Dep. at 85-86, 91, 94, 205; Mack Aff. ¶ 8). Specifically, she testified that when she met with Gallina, she told him:

> "I was plagued with a lot of sexist issues with [Connolly]. I didn't go into very much detail. The way he wanted me to break Union rules. I didn't like the way he talked to me in a sexual manner and he just pretty much stared at me."

(Mack Depo. at 86). Later in the deposition, she testified further about the alleged conversation:

> "Q: When you went to Mr. Gallina, did you say, 'I want you to conduct an investigation'?
>
> A: Those weren't my exact words. It was more like a plea, like, it went to the form of, 'This guy is very abusive.'

> He had basically rustled his hair and stared at me and said, 'What do you mean?'
>
> I said, 'Phil, this guy is always making rude and sexist comments to me and can that help the decision for me to at least go to mod, so I could be out under his care.' He was my mechanic in charge, I have to do what he says."

(*Id.* at 205).

Mack cannot properly rely upon her alleged conversation with Gallina to impute liability to Otis. A plaintiff "cannot withstand summary judgment without presenting evidence that she gave the employer enough information to make a reasonable employer think there was some probability that she was being sexually harassed." *Schiraldi v. AMPCO System Parking, ABM*, 9 F. Supp. 2d 213, 221 (W.D.N.Y. 1998) (quoting *Zimmerman v. Cook County Sheriff's Dept.*, 96 F.3d 1017, 1019 (7th Cir. 1996)). For example, in *Hawkins v. Maximus, Inc.*, No. 99 C 0954, 2000 WL 1898494 (N.D. Ill. Dec. 21, 2000), plaintiff Yvette Hawkins ("Hawkins") brought suit against her former employer, Maximus Inc. ("Maximus"), for refusal to take preventive action against her co-worker, Timothy Bannister ("Bannister"), prior to Bannister's raping Hawkins. Hawkins alleged that Maximus was on notice because she had told her project manager that: (1) Bannister "was following her home and that she was 'spooked' by it"; (2) she thought Bannister was a "pervert"; and (3) Bannister "was complementing her, telling her she owed him for the job and telling her he liked black girls, not white girls." *Id.* at *2. The court held that Maximus could not be held liable to Hawkins:

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> "The complaints Hawkins made to [her project manager] are sufficient to put the employer on notice that Bannister was a boor, but are not sufficient to inform Maximus that a severe alteration of the terms and conditions of Hawkins's employment was imminent. I do not mean to suggest that Maximus would be liable only if it knew that the rape was about to happen; it must have been on notice of sexual harassment in general—severe gender-based conduct that subjectively and objectively alters the terms and conditions of employment. Here, Maximus knew only that Bannister was making Hawkins work late, and making suggestive comments to her."

Id. at *3; *see also, e.g., Taylor v. CR Chicago Rawhide*, No. 98-C-2493, 1999 WL 41380, at *4 (N.D. Ill. June 9, 1999) (plaintiff discussed name-calling but failed to mention touching or other bullying and therefore failed to give sufficient notice of the harassment to the employer).

Here, no reasonable juror could conclude that Gallina was on notice of the alleged harassment. While Mack alleges that she was subject to harassment by numerous individuals, she concedes that her only complaint to Gallina was about Connolly. Mack does not dispute that she never told Gallina, *inter alia*, that Connolly ever touched her, that he undressed in her presence or that he bragged about his sexual exploits to her. Indeed, Mack admits that she "didn't go into very much detail" with Gallina about her allegations. (Mack Dep. at 85). Her alleged complaints to Gallina about harassment

also appear to focus on Connolly's desire for her to break Union rules—*i.e.*, complaints having nothing to do with harassment.[9] In May 2000, when she did provide additional details to Otis and Local 1 about the alleged harassment—including specific information about her allegation that Connolly improperly touched her approximately nine months earlier—Otis responded immediately to her complaint. (Defts. Rule 56.1 Stmt. ¶¶ 30-31, 33; Pltfs. Rule 56.1 Stmt. ¶¶ 30-31, 33). Finally, and in any event, Mack has apparently abandoned any argument that the alleged conversations with Gallina could impute knowledge of the harassment to Otis because she fails to refer to those conversations in her memorandum of law in opposition to defendants' motions for summary judgment.

B. Constructive Discharge

Mack alleges that she was forced to resign because "[d]efendants intentionally created an atmosphere where [she] was continually subjected to egregious harassment."

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9. When asked specifically about the Union rules that Connolly wanted Mack to break, she testified:

> "There were certain Union rules that they came out with at the Union meetings, a helper could not be left alone with the tools. If the helper was found left alone using a tool, without a mechanic, the helper would be fired immediately. He had a bad reputation of always breaking that rule, so he can go do whatever." (Mack Dep. at 86).

(Pl. Br. at 20).[10] To prevail on a claim for constructive discharge, Mack must show that Otis intentionally created an intolerable work atmosphere that forced her to resign. *Chertkova v. Connecticut General Life Ins. Co.*, 92 F.3d 81, 89 (2d Cir. 1996). Working conditions are intolerable if they are "so difficult or unpleasant that a reasonable person in [the] employee's shoes would have felt compelled to resign." *Id.* (citation omitted). "[C]onstructive discharge also requires deliberate action on the part of the employer." *Whidbee v. Gazarelli Food Specialties Inc.*, 223 F.3d 62, 74 (2d Cir. 2000). "While the meaning of 'deliberate' in this context is unsettled, case law suggests it is something beyond mere negligence." *Id.* (citations omitted); *see also, e.g., Kader v. Paper Software, Inc.*, 11 F.3d 337, 341 (2d Cir. 1997) ("Plaintiff demonstrated that an uneasy and stressful environment existed, but adduced no evidence to support an inference that the employer intentionally created an intolerable workplace.").

Mack has failed to provide evidence of either intentional or deliberate actions by Otis that forced her to resign. The day after Mack's father contacted Local 1 Secretary Treasurer Orrigo and Otis branch manager Sheppke to notify them about Mack's alleged difficulties at the work site, a meeting was arranged among Mack, her father, and representatives from Local 1 and Otis to discuss her allegations. (Defts. Rule 56.1 Stmt. ¶¶ 30-31; Pltfs. Rule 56.1 Stmt. ¶¶ 30-31). Barrett explained to Mack that an investigation had already begun

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10. While Mack appears to be asserting this claim against both Otis and Local 1, it is obviously inapplicable to Local 1. *See, e.g., Cooper v. Wyeth Ayerst Lederle*, 106 F. Supp. 479, 501 (S.D.N.Y. 2000).

and that discriminatory conduct would not be tolerated at Otis under any circumstances. (Defts. Rule 56.1 Stmt. ¶ 33; Pltfs. Rule 56.1 Stmt. ¶ 33). Barrett also offered to transfer Mack to a different location. She refused. (*Id.*) After the meeting, she failed to return to work with Otis, did not accept a transfer to another work location, declined to request an assignment to another Local 1 employer and did not cooperate in Local 1's investigation of her claims. (Defts. Rule 56.1 Stmt. ¶ 34; Pltfs. Rule 56.1 Stmt. ¶ 34). On these facts, a reasonable jury could not conclude that Mack's working conditions were so intolerable that a reasonable person in her shoes would have felt compelled to resign. *See Whidbee*, 223 F.3d at 74. Accordingly, Otis' and Local 1's motions for summary judgment on the constructive discharge claim are granted.

C. Retaliation

Mack argues that Otis and Local 1 unlawfully retaliated against her because she reported and objected to racial and gender discrimination. (Am.Compl.¶¶ 63-77). Mack alleges that the retaliatory actions taken by Otis and Local 1 include "the escalation of the hostile work environment, threats of a transfer, her constructive discharge and the Local 1's refusal to file a formal grievance on behalf of plaintiff." (Pl. Br. at 23-24).

To establish a *prima facie* case of retaliation, the plaintiff must show: (1) participation in protected activity known to the defendant; (2) an employment action disadvantaging the person engaged in the protected activity; and (3) a causal connection between the protected activity and the adverse

employment action. *Reed v. A.W. Lawrence & Co.*, 95 F.3d 1170, 1178 (2d Cir. 1996); *Badlam v. Reynolds Metals Co.*, 46 F. Supp. 2d 187, 204 (N.D.N.Y. 1999). A causal connection can be established by showing that the protected activity was followed by discriminatory conduct or that similarly situated employees were treated differently. *Sumner v. United States Postal Service*, 899 F.2d 203, 209 (2d Cir. 1990). A plaintiff merely needs to establish facts adequate to permit an inference of retaliatory motive to make out his or her prima facie case and shift the burden to the defendant to present non-retaliatory reasons for the employment action. *Ostrowski v. Atlantic Mutual Ins. Cos.*, 968 F.2d 171, 182 (2d Cir. 1992).

Mack has failed to demonstrate retaliation by Otis or Local 1 because there is no evidence that she was subject to any adverse employment actions. As discussed above, Mack was not constructively discharged. Nor is there any evidence that, even if a hostile work environment did exist, it "escalated" as a direct result of Mack's voicing her complaints. Further, Mack's assertion that Otis responded to her complaints with "threats to move her out of the Met Life Building to a building where she would not have been able to receive overtime," (Pl. Br. at 25 (citing Mack Dep. at 108-09)), is belied by her own deposition testimony:

> "Q: You told me before [Barrett] did offer you a transfer to another job site?
>
> A: Yes, I did. I don't recall if he made—you asked me if it was at [the May 18, 2000] meeting and that, I don't recall.

Q: What job site did he offer to transfer you to?

A: Rockefeller Center.

. . .

Q: Did you go to Rockefeller Center?

A: No, I did not.

Q: Why not?

A: I didn't feel it was safe. I didn't feel safe with Otis anymore at that point. I felt my trust was betrayed.

Q: You thought what?

A: I just felt betrayed by the whole company, the Union itself."

(Mack Dep. at 106-08).[11]

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11. Mack testified that there were no overtime opportunities available to her at Rockefeller Center—one of the facts upon which her retaliation claim is based. (Mack Dep. at 108). But no reasonable jury could conclude that Barrett's offer to transfer Mack to a work site that did not offer overtime, in response to Mack's harassment complaint that he had just learned of, was to "retaliate" against her for grieving that complaint. In any event, Otis' offer to transfer Mack was a reasonable response to her allegations arising from the May 18, 2000 meeting. *See, e.g., Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 676 (10th Cir. 1998) (reasonable responses include "scheduling changes and transfers").

Finally, there is no evidence that Local 1 refused to file a formal grievance on Mack's behalf. To the contrary, Mack admits that after the May 18, 2000 meeting, she failed to return to work with Otis and failed to cooperate in the Union's investigation into her claims. (Defts. Rule 56.1 Stmt. ¶ 34; Pltfs. Rule 56.1 Stmt. ¶ 34). Therefore, Mack cannot properly oppose summary judgment on this ground. *See, e.g., Lambert v. New York State Office of Mental Health*, No. 97-CV-1347 (JG), 2000 WL 574193, at *13 (E.D.N.Y. Apr. 24, 2000) (granting summary judgment on plaintiff's retaliation claim because of, *inter alia*, plaintiff's "failure to show up for work" and "her refusal to cooperate in the investigation against her").[12]

D. Duty of Fair Representation

"It is well established that a union's breach of its duty of fair representation may subject it to liability under Title VII." *Agosto v. Correctional Officers Benevolent Ass'n*, 107 F. Supp. 2d 294, 303 (S.D.N.Y.2000) (citations omitted). To state a claim against Local 1 for breach of duty of fair representation, Mack must demonstrate: "(1) that the company committed a violation of the collective bargaining agreement with respect to the plaintiff; (2) that the Union

12. Mack argues that Local 1's refusal to file a formal grievance on her behalf in response to her filing an EEOC complaint is "*per se* retaliation in violation of Title VII." (Pl. Br. at 25). But Mack did not even file her EEOC charge until December 20, 2000—*i.e.*, two months after she filed the initial complaint in this action and seven months after her last day of employment at Otis. *See* Charge of Discrimination dated December 20, 2000 attached to the Affidavit of Richard H. Markowitz sworn to on November 19, 2001.

permitted that breach to go unrepaired, thus breaching its own duty of fair representation; (3) that there was some indication that the Union's actions were motivated by racial animus." *Ross v. Communications Workers of America*, No. 91 Civ. 6367(LAP), 1995 WL 351462, at *6 (S.D.N.Y. June 9, 1995), *aff'd*, 100 F.3d 944 (2d Cir. 1996).

Mack cannot demonstrate that Otis committed a violation of the CBA. Under the CBA, Otis and Local 1 agree that they intend to "comply and cooperate with all Federal, State and/or Local laws, codes, rules and ordinances prohibiting discrimination based on race, creed, color, sex, national origin, age, sexual orientation, marital status or disability." (Defts. Rule 56.1 Stmt. ¶ 7; Pltfs. Rule 56.1 Stmt. ¶ 7). As discussed above, even assuming that Mack was harassed by fellow Otis employees, liability for that harassment cannot be imputed to Otis: (1) none of the alleged harassers, including Connolly, can be construed legally as Mack's "supervisor"; and (2) there is no evidence that Otis "either provided no reasonable avenue of complaint or knew of the harassment but did nothing about it."

Even if Otis did breach the CBA, Mack cannot show that Local 1 permitted that breach to go unrepaired. Mack failed to invoke properly the grievance and arbitration procedures available to her pursuant to the CBA and Local 1's By-laws until at least May 2000—procedures that she admits she was made aware of upon her arrival at Otis. (Defts. Rule 56.1 Stmt. ¶ 11; Pltfs. Rule 56.1 Stmt. ¶ 11). Specifically, she did not "discuss the issue with [her] supervisor and/or business agent within ten (10) days after the cause of the grievance [was] known or should reasonably

have been known," as mandated by the CBA. (Defts. Rule 56.1 Stmt. ¶ 7; Pltfs. Rule 56.1 Stmt. ¶ 7). Nor did she comply with Local 1's by-laws which state that "[w]hen a member of this Local desires to charge a fellow member with having violated any of the provisions of this Constitution and By-Laws, a written charge stating the nature of the violation . . . shall be filed with the Executive Board." (Defts. Rule 56.1 Stmt. ¶ 8; Pltfs. Rule 56.1 Stmt. ¶ 8).[13]

Mack's argument that Local 1 breached its duty of fair representation by failing to file a grievance with Otis on her behalf is unpersuasive. Even if Local 1's failure to file a grievance on Mack's behalf were negligent—a dubious position given Mack's own failures to follow the applicable grievance and arbitration procedures—no breach of duty could result. Negligence or "tactical errors" on the part of the union do not show a breach of the duty of fair representation. *Cruz v. Local Union No. 3, Int'l Bhd. of Elec. Workers*, 34 F.3d 1148, 1153-54 (2d Cir. 1994). Mack's argument is further undermined by her failure to cooperate with Local 1's investigation of her complaints following the May 18, 2000 meeting. *See, e.g., Pegump v. Rockwell Int'l Corp.*, 109 F.3d 442 (8th Cir. 1997) (finding that Union

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13. Mack testified that she complained to three people within Local 1 about the alleged harassment: Reiff, Orrigo and Green. (Mack Depo. at 173). She stated that her complaints to Green and Orrigo were in May 2000, but her complaints to Reiff may have occurred as early as April 2000. (*Id.* at 174). She admitted, however, that she never made any written complaint to anyone within Otis or Local 1, including Reiff. (*Id.* at 174, 462-63, 469-70). Further, there is no evidence that those individuals were either Mack's supervisors or business agents, as required by the CBA.

did not breach its duty of fair representation where, after employee was suspended, Union ceased its efforts to process grievance after employee refused to cooperate in investigation of her conduct).

Even if it could somehow be construed that Mack did properly file a timely grievance, Local 1's failure to arbitrate that grievance does not create a breach of their duty. It is well-established that a union member does not have an absolute right to have her grievance taken to arbitration. *See Vaca v. Sipes*, 386 U.S. 171, 191 (1967); *Kings County Hospital Center*, No. 99-CV-3927 (ILG), 2000 WL 1868088, at *3 (E.D.N.Y. Oct. 25, 2000); *De Gennaro v. New York City Housing Auth.*, No. 92 Civ. 5985(MBM), 1995 WL 37850, at *6 (S.D.N.Y. Jan. 31, 1995) ("Even if the Union made an erroneous determination regarding the merit of plaintiff's claim, so long as the decision not to arbitrate was made in good faith, as it was here, the Union cannot be held liable for unfair representation."), *aff'd*, 71 F.3d 405 (2d Cir. 1995).

III. Attorneys Fees

In light of the ruling on defendants' motions for summary judgment, defendants' motion for a protective order is moot. Counsel shall inform the Court whether defendants wish to pursue their motion for attorneys fees in connection with making the motion for a protective order.

Appendix B

CONCLUSION

Defendants' motions for summary judgment are granted. The Clerk of the Court shall mark this action closed and all pending motions denied as moot.

SO ORDERED:

Dated: New York, New York
December 18, 2001

s/ Loretta A. Preska
Loretta A. Preska, U.S.D.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED MAY 14, 2003

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE
CLERK

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 14th day of May two thousand three.

Present:

Hon. Wilfred Feinberg,
Hon. Richard J. Cardamone,
Hon. Robert D. Sack,
CIRCUIT JUDGES.

Docket No. 02-7056

Appendix C

Yasharay Mack,

Plaintiff-Appellant,

v.

Otis Elevator Company and
Local 1 International Union of Elevator Constructors,

Defendants-Appellees.

A petition for panel rehearing having been filed herein by Appellee Local 1 International Union of Elevator Constructors.

The panel is of the view that it is sufficiently clear from the opinion disposing of the appeal that the Court intented to affirm the dismissal of all of the plaintiff's claims against Local 1 International Union of Elevator Constructors.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

FOR THE COURT
ROSEANN B. MACKECHNIE, Clerk

By: s/ Arthur Heller
Arthur M. Heller,
Administrative Attorney

Supreme Court, U.S.
FILED
OCT 14 2003
OFFICE OF THE CLERK

(2)

No. 03-229

IN THE

Supreme Court of the United States

OTIS ELEVATOR COMPANY,

Petitioner,

v.

YASHARAY MACK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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The sole question presented by the Petition is whether the Second Circuit erred when it found that an employee paid on an hourly basis, and who controlled the terms and conditions of Respondent's workplace, could be considered Respondent's supervisor.

Neither the Second Circuit's actual ruling, nor the record below, raised the question presented by the Petition. The ruling is not in conflict with either Congress's intent, nor the court's rulings in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), or *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

The Second Circuit's ruling is proper in all respects and Respondent respectfully urges this Honorable Court to deny the Petition for Writ of Certiorari.

THE PARTIES

Petitioner, Otis Elevator Company ("Otis"), employed the Plaintiff-Respondent Yasharay Mack ("Mack") and her alleged harasser, James Connolly ("Connolly"). Connolly was employed as the "Mechanic-in-Charge" at the worksite where Mack was employed. Mack's title was that of a "Mechanic's Helper." This is an apprentice position that answers directly to the "Mechanic" to which she was assigned. It is undisputed that the "Mechanics" were responsible for training Mack in elevator repair and maintenance. Connolly was the "Mechanic-in-Charge" who was responsible for ensuring that work on the site was completed and distributed in an appropriate manner, and he was responsible for completing all the work the "Mechanics" completed, which included training Mack. Additionally, Connolly was responsible for making overtime assignments. In essence, Connolly was exactly what his title connotes. He was *in charge* of the "Mechanics" Mack reported to, and he was in charge of Mack herself.

Whereas Petitioner has stated that Connolly could take no tangible employment actions against Mack, that is disputed as Mack alleged that Connelly controlled the terms and conditions of her employment in that she was denied overtime

opportunities, denied training, and given demeaning work assignments such as running personal errands by Mr. Connolly.

NEITHER THE RECORD NOR THE DECISION BELOW RAISES THE QUESTION PRESENTED BY THE PETITION

The case below as it relates to Petitioner's claim involves one question. Did the Petitioner's employee have, and exercise, substantial responsibility over the Respondent? When broken down to its essence the true question becomes did the Petitioner's employee control the terms and conditions of Respondent's employment to the extent that he could utilize his position as an employee of Petitioner to harass the Respondent? The Second Circuit answered this question in the affirmative, holding that Petitioner's failure to have an onsite supervisor coupled with the actual authority as well as the perceived authority vested in Petitioner's employee was substantial enough to warrant Petitioner's employee to be considered a supervisor under *Faragher* and *Ellerth*.

The question presented by Petitioner focuses not on actual or apparent authority nor even the actual responsibilities held by Petitioner's employee. Petitioner's question focuses on the method in which Petitioner's employee was paid, in that they only refer to him as an hourly worker. Petitioner made this argument to the Second Circuit to no avail as the Second Circuit's decision clearly determined that the method of payment is not an appropriate yardstick to determine supervisor status.

REASON FOR DENYING THE PETITION

A. The Second Circuit's Decision Below Comports With The Congressional Intent Of The Law As Well As The Decisions Rendered By This Honorable Court.

The Second Circuit's decision below clearly comports with the congressional intent of the law as well as the decisions rendered by this Honorable Court. Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, ("Title VII") does not define the term "supervisor." The two (2)

Supreme Court cases, *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, and *Faragher v. City of Boca Raton*, 524 U.S. 775, define the term only as someone with "immediate or successively higher authority over the employee."

The Second Circuit's ruling, determining supervisor status, based their decision not upon whether the employer gave the employee the authority to make economic decisions concerning his or her subordinates, but rather focused on whether the authority given by the employer to the employee enabled or materially augmented the ability of the supervisor or employee to create a hostile work environment for his or her subordinates.

The Second Circuit's ruling is more current than the various interpretations of the Seventh Circuit's decision in *Parkins v. Civil Constructors, Inc.* 163 F.3d 1027 (7th Cir. 1998). The Seventh Circuit in *Parkins* presupposes that supervisors are empowered by their companies to make decisions with regard to hiring and firing. As the facts in the instant matter came to light, Petitioner appeared to attempt to insulate themselves from all claims under Title VII simply by removing any employee with the ability to hire and fire from the direct workforce. In the instant case, the only individual employed by Petitioner who claimed to have the ability to hire or fire the Respondent was a Director of Human Resources who was far removed from the actual worksite.

The Second Circuit's determination was far more practical. The determination focused on whether the relationship to the victim of the alleged harasser was such that it constituted a continuing threat to the victim's continued employment or whether it contributed to conditions that made the Respondent vulnerable to and defenseless against the harasser's particular conduct in ways that comparable conduct by a mere coworker would not.

In the instant action, Respondent was subject to the whim of the "Mechanic in Charge." Essentially, he directed Mack to tighten what bolts and grease what fittings he specified. He also had the power of the purse strings over the Respondent in that he would hand out assignments, which may or may not lead to overtime opportunities and he was specifically responsible for

handing out certain overtime assignments. When these duties are coupled which his obligation to lead and train the workforce, the conclusion that he was a Supervisor is demanded.

The decision below correctly determines the liability for sexual harassment by a co-employee who controls the terms and conditions of another's employment. The Second Circuit appropriately determined that Connolly exercised control over the terms and conditions of Mack's employment. In arriving at that decision, the Second Circuit observed that Connolly directed the workforce and substantially controlled every decision made by Mack in her capacity as an elevator "Mechanic's Helper." Even Mack's title connotes that it was her job to help the "Mechanics." Connolly was a step above the "Mechanics" as he was the "Mechanic in Charge."

B. The Second Circuit's Decision Is In Accord With The EEOC's Enforcement Guidlines.

The Second Circuit's decision is in accord with the EEOC's Enforcement Guidelines, which state as follows:

> An individual qualifies as an employee's supervisor if: (a) the individual has authority to undertake or recommend tangible employment decisions affecting the employee; or (b) the individual has authority to direct the employee's daily work activities. EEOC: Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors, 8 Fair Empl. Prac. Manual (BNA) 405: 7651, 7654 (2003)

This standard as applied by the Second Circuit is the appropriate determiner for concluding that Connolly was Mack's supervisor in that he had the authority to direct Mack's daily work activities. Additionally, although Petitioner disputes it, he did have the authority to undertake tangible employment decisions affecting her employment. He testified that he distributed overtime and it is quoted as a footnote in Petitioner's brief that if an employee did not listen or was having problems that it was his responsibility to complain about it.

C. The Second Circuit's Decision Does Not Create A Conflict Among The Circuits On An Important And Recurring Question Of Federal Law.

Petitioner misinterprets the decision on *Parkins* when it argues that the Seventh Circuit has interpreted a supervisor to be an employee with ability to hire and fire. The Seventh Circuit defined a supervisor in *Parkins* as follows:

> Hence, it is manifest that the essence of supervisory status is *the authority to affect the terms and conditions of the victim's employment.* This authority *primarily* consists of the power to hire, fire, demote, promote, transfer, or discipline an employee. Absent an entrustment of at least some of this authority, an employee does not qualify as a supervisor for purposes imputing liability to the employer.

(emphasis added).

Parkins does not hold that a "supervisor" must have the ability to hire or fire as is argued by the Petitioner. *Parkins* holds exactly as the Second Circuit's decision that "the essence of supervisory status is the authority to affect the terms and conditions of the victim's employment." The Second Circuit found that Connolly had the ability to affect the terms and conditions of Mack's employment.

CONCLUSION

This case raises no far reaching issues beyond the single case sensitive facts of this particular situation. If Petitioner's argument is taken as correct then they would have this Court allow every employer the ability to insulate themselves from claims under Title VII simply by removing the ability to hire and fire from all but those employees who have anything but sterile supervised contact with employees. That is what Petitioner attempted to do herein. If their argument is believed then no one at the job site controlled the terms and conditions of Ms. Mack's job. This position defies logic.

For all the foregoing reasons, Respondent respectfully requests that this Court deny the petition.

Respectfully submitted,

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(3)

Supreme Court, U.S.
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No. 03-229

IN THE

Supreme Court of the United States

OTIS ELEVATOR COMPANY,

Petitioner,

v.

YASHARAY MACK AND LOCAL ONE, INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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CORPORATE DISCLOSURE STATEMENT

Petitioner's corporate disclosure statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I. The Petition Presents An Important Question Of Law As To Which The Courts of Appeals Disagree

• The Second Circuit itself flatly rejected Respondent Mack's suggestion (Br. in Opp'n at 5) that there is no conflict between the holding below and the rule followed by the Seventh Circuit. In the Seventh Circuit, as that court held in *Parkins v. Civil Constructors, Inc.*, 163 F.3d 1027 (7th Cir. 1998), and reiterated in *Hall v. Bodine Electric Co.*, 276 F.3d 345 (7th Cir. 2002), a corporate employee is not a supervisor for the purpose of imposing vicarious liability on the corporation unless he or she has "the authority to 'hire, fire, demote, promote, transfer, or discipline'" the victim. *Id.* at 355 (quoting *Parkins*, 163 F.3d at 1034). The Second Circuit acknowledged that "[i]t is undisputed that Connolly had no such authority with respect to Mack." (App. A at 16a.) Its holding that Connolly was Mack's supervisor as a matter of law, (App. A at 18a), therefore rests squarely on the Second Circuit's refusal to follow the rule adopted by the Seventh Circuit. *See* App. A at 17a ("We therefore conclude that the authority that renders a person a supervisor for purposes of Title VII analysis is broader than that reflected in the *Parkins* test").

• As a recent and extremely thorough district court opinion states, "[t]he definition of the term 'supervisor' for Title VII purposes is a question that has divided the courts." *Browne v. Signal Mt. Nursery, L.P.*, No. 1:01-CV-351, 2003 U.S. Dist. LEXIS 18018, at *15 (E.D. Tenn. Sept. 29, 2003). *Browne* recognizes the split between the majority of courts, which follow the Seventh Circuit, and the "minority of courts and the EEOC [which] have adopted a broader view defining a supervisor in terms of an individual's power or authority to adversely affect the victim's working environment and otherwise restrict the victim's freedom or ability to respond." *Id.* at *16. *Browne* christens the minority position "the *Mack*/EEOC definition of 'supervisor'." *Id.* at *22, *31; *see also id.* at *21 ("the *Mack*/

EEOC test"), *23 ("the *Mack*/EEOC rule"), *24 ("the *Mack*/EEOC approach"). This Court should decide whether the majority of courts or the minority that follow the "*Mack*/EEOC rule" are correct.

• This case squarely presents the difference between the conflicting rules. The Second Circuit found Connolly to be Mack's supervisor as a matter of law because "he had and exercised the authority to make and oversee the daily work assignments of the mechanics and mechanics' helpers at 200 Park, including Mack." (App. A at 18a.) That rationale adopts the statement in the EEOC's enforcement guidelines that an individual is a supervisor if "'[t]he individual has the authority to direct the employee's daily work activities.'" (App. A at 17a-18a (quoting *EEOC Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors*, 8 Fair Emp. Prac. Manual (BNA) 405:7654 (1999))). The Seventh Circuit's definition of supervisor, however, recognizes only the first part of the EEOC's disjunctive test, that an individual is a supervisor if "the individual has authority to undertake or recommend tangible employment decisions affecting the employee." *Id.* Since Connolly concededly had no such authority, he is as a matter of law not a supervisor under the majority rule. The record here, therefore, requires a clear choice between the majority and the *Mack*/EEOC definitions.[1]

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1. Mack suggests that Connolly is a supervisor because of the asserted connection between his role in coordinating job assignments and the possibility of overtime pay. (Br. in Opp'n at 3-4.) Otis submits that the limited ability to affect overtime pay that even Mack suggests — that Connolly "would hand out assignments, which may or may not lead to overtime opportunities and he was specifically responsible for handing out certain overtime assignments," (*id.*) — does not constitute the ability to take a tangible employment action as that term is used in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). In any event, the Second Circuit explicitly did not base its holding on Mack's role with regard to overtime, which it considered a disputed issue of fact. (App. A at 6a, 19a n.7.)

II. The Holding Below Is Inconsistent With This Court's Opinions In *Ellerth* And *Faragher*

• The question resolved in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), was when Congress intended an employer to be responsible for sexual harassment of one of its employees by another employee. The Court's answer recognized that Congress did not desire to impose vicarious liability on corporate employers for the actions of all of their employees; rather, Congress held corporations liable for the actions of employees to whom the corporation had delegated significant authority that aided them in their wrongful acts. *See Ellerth*, 524 U.S. at 763-64; *Faragher*, 524 U.S. at 791-92, 800-01. Relying on both "the virtue of categorical clarity," *Faragher*, 524 U.S. at 801, and the empirical observation that an employer has greater control over the limited population of supervisors than over the total body of its employees, *id.* at 803, the Court held that employers faced vicarious liability for harassment committed by supervisors. Supervisors, the Court explained, have "been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under [their] control." *Ellerth*, 524 U.S. at 762. That delegated corporate power, whether or not it was actually exercised, identified supervisors as employees for whose actions it was appropriate to hold the employer vicariously liable.

• Connolly is not a member of that "distinct class of agent" because he was not "empowered by the company . . . to make economic decisions affecting" Mack or to influence such decisions. Rather, the Second Circuit called him a supervisor because of his ability to direct Mack's day-to-day activities. In Mack's words, Connolly was a supervisor because "he directed Mack to tighten what bolts and grease what fittings he specified." (Br. in Opp'n at 3.) That same statement, however, could be made about every journeyman mechanic with whom Mack, a mechanic's helper or apprentice, worked. As the *Browne* court observed, "[t]he sheer numerosity of potential supervisors

under the *Mack*/EEOC rule is directly contrary to the Supreme Court's own understanding of what it was doing in *Ellerth* and *Faragher*." *Browne*, 2003 U.S. Dist. LEXIS 18018, at *23. By labeling as "supervisors" anyone who directs another employee's activities at work, even temporarily, (*see* Pet'n for a Writ of Cert. at 17-18 & n.22), the *Mack*/EEOC approach imposes vicarious liability without regard to the employer's inability to select carefully, train extensively, and closely monitor an indeterminate group that may include most of its employees. *But see Faragher*, 524 U.S. at 803 ("the employer has a greater opportunity to guard against misconduct by supervisors than by common workers; employers have greater opportunity and incentive to screen them, train them, and monitor their performance.") In so doing, the *Mack*/EEOC doctrine upsets the careful balance struck by Congress and implemented in *Ellerth* and *Faragher*.

• By imposing vicarious liability based on the actions of a broad and uncertain group of employees, the *Mack*/EEOC analysis also impedes the *Ellerth* and *Faragher* policy goal of maximizing the employer's incentive and ability to prevent Title VII violations. "The more nebulous the standard for determining which employees are supervisors, the less incentive there is for companies to engage in preventive forethought." *Browne*, 2003 U.S. Dist. LEXIS 18018, at *23.[2]

• Mack argues that the Seventh Circuit rule urged by Otis would allow employers to avoid liability by centralizing

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2. The pending petition for writ of certiorari in *Pennsylvania State Police v. Suders*, No. 03-95 (U.S., filed Jul. 14, 2003), presents similar policy concerns. The petition in *Suders* seeks review of a Third Circuit opinion, *Suders v. Easton*, 325 F.3d 432 (3d Cir. 2003), which held that a constructive discharge constitutes a "tangible employment action" within the meaning of *Ellerth* and *Faragher*. In *Suders* as here, the lower courts are divided over the location of the line drawn by Congress and this Court around an employer's vicarious liability. In this case, that division concerns *for whom* the employer may be vicariously liable, a question that is closely linked to the issue of *for what* the employer may be vicariously liable that is raised in *Suders*.

decisions with respect to employee status in administrative officials with extremely limited contact with other employees. (Br. in Opp'n at 3, 5.)[3] The *Parkins* definition of supervisor, however, is not limited to corporate employees who can on their own accord take a tangible employment action; it also considers as a supervisor anyone who can recommend or influence a tangible employment action. *See Browne*, 2003 U.S. Dist. LEXIS 18018, at *29-30. It is inconceivable that employers would accept the loss of efficiency that would result from personnel systems in which decisions are made without evaluations from day-to-day supervisors in order to avoid potential Title VII liability. *Id.* at *30.

CONCLUSION

For the reasons stated above and in Otis's Petition, this Court should grant Otis's Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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3. Mack also argues that Connolly should be considered a "supervisor" because Otis did not have an onsite supervisor. (Br. in Opp'n at 2.) Even if that were an accurate statement of the facts, (*but see* Pet. for a Writ of Cert. at 6 & n.4), nothing in Title VII or in *Ellerth* and *Faragher* suggests that every worksite must have a resident supervisor, or that in the absence of a supervisor, the senior employee will be considered a supervisor for the purpose of imposing vicarious liability on the employer.